Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

SERGIO CARRANZA-HERNANDEZ; KATHLEEN ELIZABETH WATSON, an incompetent, by and through her Guardians ad Litem VINCENT F. WATSON and SUSAN L. WATSON, both individually and on behalf of all other similarly situated,

Petitioners,

v.

ARTEMIS S.A.; ALTUS FINANCE, S.A.; AURORA NATIONAL LIFE ASSURANCE COMPANY; NEW CALIFORNIA LIFE HOLDINGS, INC.; MUTUELLE ASSURANCE ARTISANALE de FRANCE; MAAF VIE, OMNIUM GENEVE S.A.; LEON BLACK, APOLLO ADVISORS, LP; FRANCOIS PINAULT, S.D.I. VENDOME S.A.; CHAURAY VALEURS S.A.; FINANCIERE du PACIFIQUE S.N.C.; CREDIT LYONNAIS; CDR ENTERPRISES, INC.; STATE OF CALIFORNIA; JOHN GARAMENDI; CHUCK QUACKENBUSH; and INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
(Rule 14.1(a))

1. Whether the Class Action Claims of Policyholders of a Failed California Insurer That Allege Fraud in the Transfer of the Insurer's Assets Can Be Dismissed *With Prejudice* for Lack of Standing under Federal Rules of Civil Procedure, Rule 12(b)(6), by Use of a *Conditional Dismissal* Based on Insufficient *Tolling Agreements* and Erroneous *Tolling Principles*, That Avoids Determination of Factual Questions of Merit Standing and Statutory Standing, and That Anticipates a *"Re-Filing"* of the Claims If a Future Factual "Bombshell" Develops?

2. Whether the Tolling Doctrines Announced by This Court in *American Pipe & Construction Co. V. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and , *Cork & Seal Co. V. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), Extend the Statute of Limitations to Protect Class Members in the "Re-Filing" of a Subsequent Class Action after a Dismissal of an Initial Class Action?

3. Whether the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. § 1441(d)) Requires That Mandatory Federal Jurisdiction over a Foreign Sovereign Defendant Include Mandatory Pendent Jurisdiction over the Entire Action Where the Foreign Sovereign Defendant Removes the Action to Federal Court and Remains a Party to the Action?

PARTIES TO THE PROCEEDING (Rule 14.1(b))

Petitioners: Sergio Carranza-Hernandez and Kathleen Elizabeth Watson, both individually and on behalf of all other similarly situated Policyholders of Executive Life Insurance Company ("ELIC").

Respondents:

1. Insurance Commissioner for the State of California is the current Insurance Commissioner, Harry Low.
2. Credit Lyonnais is a foreign sovereign (French owned) bank and financial institution conducting commercial activities in California and the United States..
3. State of California is a government entity.
4. John Garamendi is an individual and former officer and employee of the State of California and former Insurance Commissioner for the Department of Insurance.
5. Chuck Quackenbush is an individual and former officer and employee of the State of California and former Insurance Commissioner for the Department of Insurance.
6. Aurora National Life Assurance Company is an insurance company that operates certain of ELIC's former insurance businesses .
7. New California Life Holdings, Inc. is a corporation that owns and controls Aurora National Life Assurance Company and is majority owned and controlled by Artemis, S.A. through S.D.I Vendome, S.A., Chauray Valeurs, S.A., Financiere du Pacifique, S.N.C. and formerly owned and controlled by CDR Enteprises, Inc. and/or Altus Finance, S.A., Credit Lyonnais, MAAF, Vie, and Omnium Geneve.
8. Mutuelle Assurance Artisanale de France ("MAAF"") is a mutual insurer.
9. MAAF Vie is an affiliate of MAAF.
10. Artemis S.A. is a corporation that is owned and controlled

by Francois Pinault.

11. CDR Enterprises, Inc. ("CDR") is a foreign sovereign (French) entity and successor or alter ego of Altus Finance, S.A.

12. Altus Finance, S.A. is a corporation and is a predecessor or alter ego of CDR Enterprises, Inc.

13. Omnium Geneve S.A is a corporation.

14. Leon Black is an individual who is the owner and/or has control of Apollo Advisors LP.

15. Apollo Advisors LP is a limited partnership owned and/or controlled by Leon Black.

16. Francois Pinault is an individual who owns or controls certain entities including Artemis, S.A., S.D.I. Vendome, S.A., Chauray Valeurs, S.A. and Financiere Du Pacifique, S.N.C.

17. S.D.I. Vendome S.A. is a corporation owned and controlled by Francois Pinault.

18. Chauray Valeurs S.A. is a corporation owned and controlled by Francois Pinault.

19. Financiere Du Pacifique S.N.C. is a corporation owned and controlled by Francois Pinault.

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PETITION FOR WRIT OF CERTIORARI

SERGIO CARRANZA-HERNANDEZ and KATHLEEN ELIZABETH WATSON, both individually and on behalf of all others similarly situated, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This Petition is made on behalf of two separate class actions (referred to herein as *Carranza I* and *Carranza II*) filed on behalf of policyholders of a failed insurer, Executive Life Insurance Company ("ELIC"). The factual and legal claims stated in *Carranza I* and *Carranza II* are substantially similar and arise from the same factual transactions. Both were dismissed in succession by the same district court and "affirmed" by the same panel of the Ninth Circuit Court of Appeals such that both actions are addressed together in the instant Petition.

I. OPINIONS BELOW (Rule 14.1(d))

The opinions of the Ninth Circuit Court of Appeals [App.1a; and App.5a, *infra*] are unpublished memorandum opinions and are reported at 33 Fed. Appx. 364, 202 U.S. App. LEXIS 7642 (April 24, 2002) and 34 Fed. Appx 593, 202 U.S. App. LEXIS 9431 (May 13, 2002)). Orders denying Petitions for Rehearing and Rehearing En Banc are unpublished decisions [App.9a; and App. 11a, *infra*]

The opinions of the United States District Court for the Central District of California are unpublished decisions [App.12a; and App.49a, *infra*].

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

The judgment of the court of appeals in *Carranza-Hernandez v. Altus, et al.* ("*Carranza I*") was entered 24 April 2002 (App. 1a, *infra*). The judgment of the court of appeals in *Carranza-Hernandez, Watson v. Artemis, S.A., et al.* ("*Carranza II*") was entered 13 May 2002 (App. 5a, *infra*). The petitioners' timely petitions for rehearing and suggestion for rehearing en banc were denied on 27 June 2002 (App. 9a and 11a, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (Rule 14.1(f))

1. Federal Rule of Civil Procedure 12(b)(6) provides in relevant part: "The following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . ."

2. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. section 1441(d), reads in relevant part as follows:

§ 1441. Actions removable generally

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. . . .

3. California Insurance Code section 1057 reads as follows: "In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending."

4. California Insurance Code section 1037(f) reads in relevant part as follows: "Upon taking possession of the property and

business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator: . . . (f) May, for the purpose of executing and performing any of the powers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding or in the commissioner's own name, prosecute and defend any and all suits . . . in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding; . . ."

5. The United States Constitution, Article III confines the jurisdiction of the federal courts to actual "cases" and "controversies."

6. The Cartwright Act (Ca. Bus. & Prof. §§ 16700 et seq.) is California's version of the federal Sherman Act and sets forth California's antitrust laws, including price fixing prohibitions. (*Cellular Plus, Inc. v. Sup.Ct.* (U.S. West Cellular) 14 Cal.App.4th 1224, 1232, 18 Cal.Rptr.2d 308, 312 (1993)). Under § 16750(a) any persons injured in their business or property by such antitrust violations, may bring suit, regardless of whether they dealt directly or indirectly with the violator.

7. California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 - 17209) prohibits "any unlawful, unfair or fraudulent business act or practice" (§ 17200) and authorizes private causes of action (§ 17204).

IV. STATEMENT OF THE CASE (Rule 14.1(g))

1. <u>Summary of Case and Issues</u>: The lower courts have denied standing to the policyholders of a failed insurer who have claimed in two separate successive class actions (*Carranza I* and *Carranza II*) to have sustained losses in excess of $4 billion on their "restructured" policies when the assets of the insurer were illegally sold by the California Insurance Commissioner to certain

French purchasers in violation of federal and state law. The elaborate "bid rig" and "one buyer" schemes enabled the defendants to covertly violate the federal Bank Holding Company Act (12 U.S.C. § 1841 et seq.) and the California Insurance Code (section 699.5). The policyholders have stated unchallenged fraud claims against the Commissioner, the French purchasers, and their American brokers for their respective roles in the illegal transfers that resulted in their undisputed losses.

Issue 1: The district court and the Ninth Circuit Court of Appeals have summarily dismissed the policyholder' claims for lack of standing under FRCP 12(b)(6). The Commissioner is charged as a principal party defendant responsible for negotiating and perpetrating the illegal transfers to the French purchasers. The lower courts have concurrently held that only the Commissioner has "exclusive" standing to sue but that policyholders may have standing depending upon future "unexpected [factual] developments" or "bombshells" that may develop in the course of parallel litigation between the defendants. Instead of allowing discovery or proof on the merits of the policyholder standing and claims, the claims were *dismissed on condition* that certain (not all) defendants execute *tolling agreements* that anticipated the "*re-filing*" of the claims in the future. The issue is whether the lower courts can employ FRCP 12(b)(6) to summarily dismiss policyholder claims for lack of standing on the basis of an unprecedented standard of "*wait and see*" *standing* based on future factual developments which denies policyholders the opportunity to conduct discovery, prove or adjudicate their merit standing, their statutory standing or their Article III standing within the appropriate statute of limitations period.

Issue 2: The conditional dismissal with tolling agreements was ordered to purportedly protect the class of policyholders in the "*re-filing*" of their claims from the prejudice of the expiration of the limitations period, but only three (of a

total of nineteen) defendants were required to sign the tolling agreements, with the court expressly citing the tolling provisions of the Ninth Circuit (minority view) holding in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc) to purportedly protect the class action and policyholder claims, if at all, against the remaining non-signing defendants. The issue is whether the Ninth Circuit minority view extends the tolling of the limitations period to protect the policyholders of ELIC, individually and/or as a class; or whether such tolling is in direct conflict with the previous decisions of this Court.

Issue 3: The conditional dismissal in the second class action [*Carranza II*] was preceded by a dismissal "without prejudice" in the first class action [*Carranza I*] where a foreign sovereign defendant invoked the mandatory jurisdiction of the Foreign Sovereign Immunities Act (FSIA). The district court refused pendent party jurisdiction over the entire case, dismissing without prejudice to re-filing all remaining claims against all remaining defendants in the state court. The policyholders were thus forced to re-file their second action (*Carranza II*) in state court *without re-filing any action against the foreign sovereign defendants*, Credit Lyonnais and CDR Enterprises, Inc. ("CDR"). The issue is whether the FSIA removal and mandatory federal jurisdiction provision (28 U.S.C. § 1441(d)) requires that the district court not decline pendent party jurisdiction over the entire action when a foreign sovereign defendant remains a party.

2. The "Credit Lyonnais-Executive Life" Scandal: Executive Life Insurance Company ("ELIC") was seized by the California Insurance Commissioner ("Commissioner") in 1991 with its assets being sold by the Commissioner through a purported open-bid process to certain French defendants through conservation proceedings in the Los Angeles Superior Court ("Conservation Court"). The purchasing French defendants included the French government owned bank and finance entities, defendants Credit Lyonnais and CDR, which, when later sued,

invoked the mandatory jurisdiction of the federal court through the Federal Sovereign Immunities Act (FSIA).

The two primary assets of ELIC claimed to be sold separately by the Commissioner to separate French defendants consisted of (1) ELIC's junk bond portfolio and (2) ELIC's insurance business. The Commissioner's announced purpose in selling the bond portfolio was to remove the risk of the junk bonds from the insurance business, and to use the proceeds of the sale of the bond portfolio to fund a new successor insurance company to fulfill the obligations that ELIC owed to its policyholders. However, prior to the open bid process, the Commissioner agreed, in separate negotiations with the French defendants, to sell the bonds in "one lot" at far less than face value, and further agreed to "restructure" the value of ELIC insurance policies downward in order to reduce the obligations that the purported independent French investor group (MAAF Group) would owe to policyholders in their ownership and operation of the new insurance company (Aurora).

The complex shell transactions that comprised the illegal "one buyer scheme" that, on the surface, purported to be separate sales to separate purchasers of the bond portfolio and the insurance business, resulted in both assets being owned illegally by one purchaser. These transactions resulted in undisputed violations of California Insurance Code section 699.5 (prohibition on governmental entity from directly or indirectly owning or controlling a California insurer) and the federal Bank Holding Company Act, 12 U.S.C. § 1841, et seq. and 12 C.F.R. § 225.16 (prohibition on banks from directly or indirectly owning life insurance companies).

The French defendants claimed the Commissioner was aware of and "permitted" the substitution of transferees that resulted in those violations. The Commissioner claims that he was unaware of parking agreements (*contrats de portage*) that existed between and among certain French defendants which

concealed the true ownership interests of the purchasers of the bond portfolio and the insurance business. The petitioners, as policyholders, claim that the Commissioner, the French defendants and their American brokers (Black/Apollo) effectively negotiated, were aware of, and concealed material details of the purchase of the separate assets by "one buyer" in contravention of the law and representations to the Conservation Court.

The "one buyer scheme" resulted in the purported separate sales of both the insurance business (to MAAF) and the junk bond portfolio (to Altus) being controlled and owned by one buyer (Artemis S.A.) directly and through its financing co-conspirator (Credit Lyonnais). The $3.25 billion paid by Altus (controlled by Artemis/Credit Lyonnais) for the ELIC junk bond portfolio was to be used to capitalize Aurora (purportedly owned independently by MAAF) as the successive insurer for the ELIC insurance business. Through the "one buyer" scheme, however, the French defendants covertly controlled Aurora and did not actually part with the $3.25 billion paid for the $6 billion junk bond portfolio, but only transferred the purchase money ***from one pocket (Altus) to another (Artemis)*** by virtue of concealing their ownership interests through their parking agreements and their "permitted" substitution of transferees through negotiations with the Commissioner. The Commissioner, who was an advocate and architect of the plan, is accused by the French defendants and the petitioners of having material knowledge and active participation in the scheme.

The "bid rig" claims made by petitioners and the California Attorney General[1] charge that the bid process for ELIC

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[1]After a two year investigation, the California Attorney General intervened in a pending "whistleblower" action, and stated claims similar to the policyholders' claims implicating the Commissioner, the French purchasers and their American brokers. *See State of California, ex rel. RoNo, LLC v. Altus Finance S.A., et*

assets was unfairly tilted (bid-rig) in favor of the French defendants through preferential treatment, preferential access to inside information, preferential use of their Aurora bid-model, undue influence with the bidding agency (the Commissioner), and through an award of the bond portfolio bid to the French at a fire sale (below market) price at substantial loss to the ELIC estate and its policyholders. In addition, it is claimed that the "bond sale was severed" improperly from the sale of the insurance business *after all the bidding was concluded* in order to facilitate favored treatment and immediate profits for the French defendants, all in the context of a rising bond market. It is also claimed that the intended transferees of the insurance business (MAAF Group) were not "independent investors" as represented but, in fact, a front group that was "permitted" by the Commissioner to transfer their ownership interests to other French defendants (Artemis) *prior to the completion of the sale of the insurance business* in order to complete the "one buyer" scheme.

The Commissioner is further charged with his ongoing cover-up and failure to sue the American brokers ("Black/Apollo") for the French defendants *with whom he negotiated* and who were known to the Commissioner to be silent and/or secondary transferees of the bond portfolio and the insurance business (in violation of law), resulting in an estimated half billion dollar loss to the ELIC estate. Most recently, while the appellate process has been pending, the Commissioner has compounded this liability by covertly releasing these same brokers in exchange for their self-serving testimony vindicating the Commissioner, all to the prejudice of policyholders and *without any return of the assets or their profits* to the ELIC estate

3. The Parallel Actions: Parallel actions prosecuted in the "Credit Lyonnais-Executive Life" scandal in the federal

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al., USDC No. 01-CV-8587 AHM (CWx); and fns 3 and 5, *infra* .

district court include the *Commissioner's Action*[2], the California State *Attorney General's Action*[3], and the *Sierra Action*[4].

The *Commissioner's Action* names only certain French defendants and is limited to claims based upon the Commissioner's denial of his knowledge of the secret parking agreements connected with the sales. The *Attorney General's Action* addressed not only the secret parking agreements, but also charged the manipulated bid process and the culpability of defendants Black/Apollo (the American brokers) and their lead role and undisclosed equity interests in both the bond portfolio and insurance business sales. The *Sierra Action* addresses the claims of the losing bidder in the bid process.

The *Commissioner's Action* and the *Sierra Action* continue in the discovery stages in the district court. However, the petitioners' policyholder actions (*Carranza I* and *Carranza II*) and the *Attorney General's Action* have been dismissed for lack of standing with the former being the subject of the instant petition, and the latter the subject of a new appeal to the Ninth Circuit[5].

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[2] *Low v. Altus Finance S.A., et al.*, USDC No. 99-CV-02829 AHM (CWx).

[3] *State of California, ex rel. RoNo, LLC v. Altus Finance S.A., et al.*, USDC No. 01-CV-8587 AHM (CWx)

[4] *Sierra National Insurance Holdings, Inc. v. Credit Lyonnais S.A., et al*, USDC No. 01-CV-1339 AHM (CWx).

[5] *California ex rel. RoNo, LLC v. Altus Fin., S.A.*, Case No. CV 01-8587 AHM (CWx), United States District Court for the Central District of California, 2002 U.S. Dist. LEXIS 8260, May 8, 2002, Decided. The Attorney General's Notice of Appeal was filed on 7 June 2002 with his opening brief due 23 September 2002 in the Ninth Circuit Court of Appeals.

Although dismissed and denied discovery in the district court, the policyholder claims stated in *Carranza I* and *Carranza II* have been subsequently and independently corroborated in the parallel actions in the district court by claims made by the California Attorney General, the French defendants, as well as California State Auditors [6].

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[6] Evidence and claims in the parallel proceedings include: •The Commissioner's knowledge and participation in negotiations of the "one buyer" scheme; •The Commissioner's role and active participation in the manipulated bid process (bid-rig); •Claims asserted against the Commissioner for misrepresentation, concealment of illegal transactions, and intentional and/or negligent misconduct in the manipulation of the bid process; •The Commissioner's improper severance of the bond sale from sale of the insurance business *after all the bidding was concluded* in order to facilitate favored treatment and immediate profits for the French defendants, all at substantial loss to the ELIC estate; •The Commissioner's "permitted" substitution of transferees of ownership interests in the insurance business prior to the completion of the sale in order to complete the "one buyer" scheme; •The Commissioner's documented role in opposing compliance with Insurance Code section 699.5 and the Federal Bank Holding Company Act (12 U.S.C. § 1841, et seq.) in the Conservation Court in order to complete the "one buyer" scheme; •The Commissioner's failure to sue [and the later release of] the American brokers (Black/Apollo) for the French defendants who were known to the Commissioner to be silent and/or secondary transferees of the bond portfolio and the insurance business (in violation of law), resulting in an estimated half billion dollar loss to the ELIC estate; •The Commissioner's entering into "releases" of many of the parties to the transactions, both before and after the *contrats de portage* and the "one buyer" scheme became known; and •The Commissioner's improper squandering of "FEC assets" that stand as separate

4. The Opinions Below in *Carranza I* and *Carranza II*: In *Carranza I* policyholders asserted claims against the third party French defendants. These claims were dismissed (without prejudice) when the district court declined to exercise pendent party jurisdiction over the entire action under the FSIA and dismissed the claims for re-filing in the state court (Conservation Court) [App. 19a-12a] and held that the claims stated against the foreign sovereign defendants were dismissed for lack of standing because the claims asserted belonged to the trustee (the Commissioner) as the real party in interest (*see* California Insurance Code section 1037). Although the *Carranza I* policyholders requested leave to amend to add already pending public entity claims filed with the State of California against the Commissioner, the request for leave to amend was ignored by the district court [App. 46a, n. 16]. However, in *Carranza II* the policyholders asserted those claims as beneficiaries of the ELIC estate for breach of trust and fraud *against the trustee* (the Commissioner) *and the third parties*. (the French defendants and their American brokers). Petitioners relied on California law which recognizes the standing of beneficiaries to bring their *independent direct action* for breach of trust and related causes of action *against both the trustee and third parties*. (*See* California Insurance Code section 1057; *Garris v. Mitchell*, 7 Cal.App.2d 430, 46 P.2d 225 (1935); *City of Atascadero v. Merrill Lynch*, 68 Cal.App.4th 445, 462, 80 Cal.Rptr.2d 329 (1998).)

The district court indicated its purpose in *Carranza II* in entering *a dismissal on condition* of *execution of tolling agreements* as the vehicle for again recognizing the Commissioner's exclusive standing, but for somehow

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breaches of trust and losses to policyholders on their restructured FEC policies, which claims are independent of any claims against the French defendants and their American brokers.

resurrecting petitioners' standing and claims if facts so warranted in the future:

> I'm not just going to defer a ruling and permit the case to continue. . . If you could propose a different way to make sure that ***at a later time if the facts warranted*** and the facts could either be the outcome of the Commissioner's action or the way it's litigated or the ***information surfaces*** or some new ***bombshell*** that you manage to unearth, . . the only barrier I can think of offhand to having it waged later on is the statute of limitations that would probably be tolled. [App. 55a] (emphasis added)

> .... in the event that circumstances change, such as... some ***other unexpected [factual] development***, these plaintiffs' claims would not be barred by the ***statute of limitations***....to assure that plaintiffs would not be prejudiced by the passage of time between this ***dismissal*** and any ***re-filing*** of these claims... As a ***condition*** of this order, the court expects the moving parties to carry out their assurances by entering into such ***[tolling] agreements***.... [App. 52a](emphasis added)

The conditions of the dismissal required the tolling agreement of only the three moving defendants, with the court expressing "no view" as to whether tolling was effective as to the remaining (non-signing) sixteen defendants, but citing *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc) [App. 52a-53a].

On 24 April 2002, by Memorandum Opinion (not for publication), the Ninth Circuit panel decision in *Carranza I*

(SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges) "affirmed" the district court's decision in *Carranza I,* holding that the Commissioner has exclusive standing to bring the claims asserted in *Carranza I.* [App. 1a] On May 13, 2002, by Memorandum (not for publication), the same panel "affirmed" the district court's dismissal of *Carranza II* holding " for the same reason"as stated in *Carranza I* the California Insurance Commissioner has exclusive standing to bring the asserted claims, citing *Garamendi v. Executive Life Ins. Co.*, 17 Cal.App.4th 504, 21 Cal.Rptr.2d 578, 584 (Cal. Ct. App. 1993). [App. 5a] These decisions summarily "affirmed" the dismissals of the district court without addressing the conditional dismissal, the tolling provisions, the merit standing, the statutory standing, or Article III standing or other issues on appeal, including the issues addressed in this petition.

V. REASONS FOR GRANTING WRIT

Certiorari should be granted to resolve important issues of federal law; to resolve conflicts in the circuit courts of appeal on important issues of federal law that are of national importance and in need of uniform application; and to exercise the supervisory powers of this Court where the lower courts have departed from the accepted and usual course of judicial proceedings. The lower courts have implemented an unprecedented standard of *"wait and see" standing* that is in direct conflict with authority of the Supreme Court, the authority of the Ninth Circuit and all other circuits, in sanctioning the use of a conditional dismissal for lack of standing with tolling agreements that avoids factual determinations of merit standing and statutory standing in violation of the standards established under the Federal Rules of Civil Procedure, Rule 12(b)(6) and Rule 56. The lower courts have extended the tolling principles on statutes of limitation for subsequent class actions in apparent

direct conflict with the case authority of the Supreme Court on the tolling principles announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and , *Cork & Seal Co. v. Parker*, 42 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). Additionally, the lower courts are in direct conflict with the case authority of the Ninth Circuit and the majority authority from other circuits on the issue of mandatory pendent jurisdiction under the Foreign Sovereign Immunities Act where the foreign sovereign remains a party to the action..

1. A CONDITIONAL DISMISSAL FOR LACK OF STANDING WITH TOLLING AGREEMENTS THAT ANTICIPATES "RE-FILING" OF THE ACTION IF A NEW FACTUAL "BOMBSHELL" SURFACES, SUBVERTS THE DECISIONS OF THIS COURT, THE STANDARD FOR A MOTION TO DISMISS UNDER FRCP 12 (b)(6) AND THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT UNDER FRCP 56

A conditional dismissal for lack of standing under FRCP 12 (b)(6) that expressly anticipates a "re-filing" of the action where standing might exist on the basis of future factual developments, is error that admits the standing issue is one of fact, not solely a matter of law, and an issue which cannot be determined summarily at the pleading stage, without the opportunity for discovery and proof of the facts which established such standing. The petition should be granted because the lower courts have created a new unprecedented standard of "*wait and see*" *standing* that violates the decisions and procedures established by this Court for determinations of standing based on allegations of fact, particularly those facts that are intertwined with the merits of the claims. *See Gwaltney of Smithfield, LTD v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S. Ct.

376, 386, 98 L. Ed. 2d 306, 322 (1987); *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 2416-2417, 37 L.Ed.2d 254, 270-271 (1973).

When analyzing a motion to dismiss under FRCP 12(b)(6), the court must accept as true the factual allegations contained in the complaint and construe them in the light most favorable to the plaintiff. *Mishler v. Clift*, 191 F.3d 998, 1003 (9th Cir. 1999). Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle him to relief. *Id.* Thus, "the issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled *to offer* evidence to support the claims." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (quoting *Scheuer v. Rhodes*, 416 U.S. 232 , 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974) (emphasis in original).)

This Court has made it clear that "a suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact' - - not proof - - in the complaint or supporting affidavits", and if such allegations of fact are to be challenged they can only be challenged through summary judgment or trial on the merits. *See Gwaltney of Smithfield, LTD v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306, 322 (1987) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343, 356 (1975) and *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 2416-2417, 37 L.Ed.2d 254, 270-271 (1973).)

Satisfaction of the lower court's "bombshell" test is precluded by a summary dismissal at the pleading stage, without the opportunity for discovery or the opportunity to offer proof, where the petitioners' claims were terminated notwithstanding the intentions of the court to reinstate such claims if proof develops in the future. Neither the lower courts nor the respondents have disputed that petitioners have specifically pled the fraud and breach of trust claims concerning the illegal

transfers which caused their losses. However, the dismissal denies petitioners the opportunity to prove the merits of such claims and threatens the expiration of the statute of limitations on all claims for all class-action policyholders, particularly where the life of the tolling agreements expires with this petition and where the agreements were directed to be executed by only a few, and not all, defendants.

In effect, the lower courts have erroneously established a new "*wait and see*" *standing* standard under FRCP 12(b)(6) which provides for an unprecedented summary dismissal at the pleading stage and denies the required opportunity for discovery and proof of well pled allegations. *See Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (DC Cir. 1987). In doing so, the lower courts have departed from the accepted and usual course of judicial proceedings in determinations of fact by summary judgment or trial. *See, e.g., Gwaltney of Smithfield, LTD v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306, 322 (1987).

Where standing issues, jurisdictional issues, or limitation issues are intertwined with the factual merits of the substantive claims, the law is clear that the district court must employ the procedural vehicles applicable to factual determinations: namely, summary judgment proceedings if there are no triable issues of material fact (FRCP 56); or, if genuine issues of material fact exist, then trial on the merits. *See, e.g., Gwaltney of Smithfield, LTD v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987); *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947); *Rosales v. United States*, 824 F.2d 799, 802-803 (9th Cir. 1987); *The Careau Group v. United Farm Workers of America*, 940 F.2d 1291, 1293 (9th Cir. 1991). Where the material facts determining jurisdiction or standing are in dispute, as well as intertwined with the factual issues going to the merits of the substantive claims,

they must be resolved at trial by the trier of fact. *Augustine v. United States*, 704 F.2d 1074, 1077-78 (9th Cir. 1983); *Crawford v. United States*, 796 F.2d 924, 926-29 (7th Cir. 1986).

The test for determining whether the standing or jurisdictional issue is intertwined with the factual merits of the substantive claims, is whether the ultimate standing or jurisdictional issue is precisely the same as the ultimate issue on the merits. *See, e.g., The Careau Group v. United Farm Workers of America*, 940 F.2d 1291, at 1293 (9th Cir. 1991). In the instant case, where the district court anticipated possible further factual development (a bombshell) that might demonstrate the fraud or breach of trust claims alleged against the Commissioner, such facts would prove both standing and the merits of policyholder claims. Thus, the district court could not resolve such standing facts or issues as a matter of law at the pleading stage under FRCP 12(b)(6).

(a) Policyholder Standing Under State and Federal Law: Petitioners have stated claims as policyholders of ELIC that have defined their standing on the basis of the merits of their claims. Petitioners have stated merit standing, state statutory standing, and Article III standing expressly as part of their factual claims. Petitioners have sued the Commissioner, the French defendants, and the American brokers as the parties responsible for the fraud and illegal transactions resulting in violations of state and federal law which were a part of the very scheme that restructured downward the benefits owed under their insurance policies.

Merit standing exists where petitioners have sued the Commissioner and the third parties for fraud and breach of trust where both standing and the claims are based on the illegal transfers. California law recognizes the standing of policyholders and beneficiaries to bring their direct action for breach of trust and fraud related to the illegal sale of assets of a failed insurer by the trustee Commissioner. *(Garris v. Mitchell*, 7 Cal.App.2d 430,

46 P.2d 225 (1935); *see also City of Atascadero v. Merrill Lynch*, 68 Cal.App.4th 445, 462, 80 Cal.Rptr.2d 329 (1998). State law standing is recognized by California as an exception to the general rule that the Insurance Commissioner, as a receiver and trustee, is normally the "real party in interest" and the person to sue to collect the assets of the estate; and that policyholders under "ordinary circumstances" have no right to maintain such an action. (*Garris v. Mitchell*, *supra*, 7 Cal.App.2d 430 at 434.) California law specifically recognizes that "[This] rule cannot, however, be invoked by the [Commissioner] to gain immunity for his own fraudulent acts" and expressly recognizes policyholders standing for an action against the Commissioner and third parties for fraudulent transfer of the assets of the estate. *See Garris v. Mitchell*, *supra*, at 434. California law also recognizes the exception to the general rule for standing of trust beneficiaries to sue trustees (and third parties) who facilitated or caused a breach of trust. (*City of Atascadero v. Merrill Lynch*, 68 Cal.App.4th 445, 80 Cal.Rptr.2d 329 (1998); *Wolf v. Mitchell, Silberberg & Knupp*, 76 Cal.App.4th 1030, 90 Cal.Rptr.2d 792 (1999).)

> . . . [I]t is well established that where a trustee has committed a breach of trust, the trust beneficiaries may prosecute an action against third persons who, for their own financial gain or advantage, induced the trustee to commit the breach of trust; actively participated with, aided or abetted the trustee in that breach; or received and retained trust property from the trustee in knowing breach of trust. . . . The beneficiary may also sue third persons who directly participated with the trustee in breaches of trust....

City of Atascadero, *supra* at 462; *see also Garris v. Mitchell*, *supra*, 7 Cal.App.2d 430.

Statutory standing exists based on California statutes that recognize multiple and alternate grounds for petitioners'

standing, all of which were raised, but ignored, by the lower courts.

California Insurance Code section 1057, recognizes the fiduciary relationship and breach of trust cause of action where the Commissioner, like any receiver of a failed or bankrupt entity, is recognized as a trustee for the benefit of policyholders and creditors:

> In all proceedings under this Article, the Commissioner shall be deemed to be a **trustee** for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending. (emphasis added).

Cal. Ins. Code § 1057. The fiduciary duties of the Commissioner that arise from his takeover of an insolvent insurer have been recognized on repeated occasions by California courts. *In re ELIC*, 32 Cal.App.4th 344, 374-375 (1995) (Commissioner's fiduciary duty as trustee under section 1057 restrains/limits his powers under section 1037); *Commerce National Bank in Shreveport v. Superior Court*, 14 Cal.App.4th 393, 403 (1993) ("fiduciary duty" of Commissioner as trustee to all policyholders); *Muth v. Educated Security Insurance Company*, 114 Cal.App.3d 749, 758-759, 170 Cal.Rptr. 849 (1981) (Commissioner "trustee"). Moreover, the published decisions of the Ninth Circuit Court of Appeals have, in stark contrast to the unpublished decisions in the instant case, repeatedly recognized the standing of *ELIC policyholders* in suits against their trustee. (*Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995), *cert. denied*, 516 U.S. 914, 116 S.Ct. 301, 133 L.Ed.2d 206 (1995) (standing to sue ERISA trustee for breach of fiduciary duty in receiving 70% value on ELIC annuity); *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994) (ELIC annuitant beneficiaries have standing to pursue constructive trust on ill-gotten profits that reverted to the trustee as a result of alleged

breach of fiduciary duty); *see also Rigden v. Aldrich*, 795 F.2d 727 (9th Cir. 1986) (standing of beneficiary to pursue direct action for breach of trust against bankruptcy trustee for violation of fiduciary duty); *see also Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951).)

California Business and Professions Code section 16750(a) ("The Cartwright Act") also provides standing to policyholders as persons injured in their business or property by the antitrust violations alleged, regardless of whether they dealt directly or indirectly with the violators. Standing is established by the allegation that, as a direct result of conduct in violation of the Cartwright Act, the injured party has been damaged and is entitled to recover damages. *See Pines v. Tomson*, 160 Cal.App.3d 370, 382, 206 Cal.Rptr. 866 (1984); *see also Knevelbarrad Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000).

California Business and Professions Code sections 17200, et seq. ("The Unfair Competition Law") also provides standing to policyholders for private enforcement of UCL claims. The California Supreme Court, in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 572-73, 578, 71 Cal.Rptr.2d 731 (1998), has indicated a preference for *private* enforcement UCL claims, refusing to judicially limit potential UCL plaintiffs in contravention of the express "any person" language of section 17204.

Federal standing under the United States Const., Article III, § 1, et seq. was also established by policyholder claims of direct pecuniary injury ("restructured" policies) as a result of the defendants' conduct in the illegal transactions. (*Fair v. U.S. E.P.A.*, 795 F.2d 851, 852-853 (9th Cir. 1986).) The requirements for standing under Article III of the U.S. Constitution are satisfied by (1) injury in fact which is concrete and not conjectural; (2) causation; (3) redressability. (*United Food & Comm'l Workers Union Local 751 v. Brown Group, Inc.*,

517 U.S. 544, 550, 116 S.Ct, 1529, 1533, 134 L.Ed.2d 758 (1996); *see also Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 3326 82 L.Ed.2d 556 (1984).) The policyholders of ELIC qualify in all respects in having suffered "restructured" decreases in their otherwise guaranteed insurance policies, all at the hands of the fraudulent negotiations and transfers.

(b) The Commissioner's "Exclusive" Standing is "*de facto* Immunity" in the Lower Courts: The lower courts have denied standing to policyholders of the failed insurer ELIC in holding that the Commissioner has exclusive standing to bring claims for illegalities perpetrated in the negotiation, bidding, sale and transfer of ELIC assets under California Insurance Code section 1037.[7] In so holding, all the lower courts have expressly refused to address policyholders' claims against the Commissioner or rule on policyholders' standing under California Insurance Code section 1057. Under the California Insurance Code, the Commissioner acts as a "trustee" for the benefit of all policyholders and creditors of the insurer (section 1057) while, at the same time, he is given the "exclusive"

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[7]The Ninth Circuit Panel has concluded that only the Insurance Commissioner has "exclusive" standing to bring the claims asserted against him, citing "*Garamendi v. Executive Life Ins. Co.*, 21 Cal.Rptr.2d 578, 584 (Cal. Ct. App. 1993)." That decision dealt with the "exclusive jurisdiction" of the court (Conservation Court) overseeing the insurer's insolvency in exercising in rem jurisdiction over partnership assets in which ELIC had become a partner. Nothing in the decision addressed the "exclusive standing of the Insurance Commissioner" to bring claims against himself or third parties. Neither the *Garamendi* opinion nor the Ninth Circuit addressed (directly or indirectly) the merit standing of policyholders, Insurance Code section 1057, or claims against the Commissioner for breach of trust or fraud in the illegal transfer of estate assets.

authority (section 1037) to marshal the assets of an insolvent insurer. These exclusive powers include the Commissioner's right to prosecute claims against those responsible for the insurer's demise; the right to recover diverted assets of the insurer's estate; and the right to sue for insider or third party misconduct arising before or causing the insolvency (California Insurance Code section 1037). However, section 1037 does not, as the lower courts have held, extend immunity to the Commissioner (or third parties) for fraud, misfeasance or abuse of his "exclusive" powers in the administration of the estate or fraudulent transfer of the assets of an insolvent insurer. (*Garris v. Mitchell*, 7 Cal.App.2d 430, 46 P.2d 225 (1935).)

By simply ignoring that petitioners claims were stated *against the Commissioner* responsible for the fraudulent transfers, the lower courts ignored California's statutory standing for policyholders under Insurance Code section 1057, in favor of holding that only the Commissioner can sue for the fraud to which he was a party. If, as the lower courts have expressed, *the Commissioner has exclusive standing*, then he has *exclusive standing to bring claims against himself.* The result which follows is that the Commissioner is above the law, and answers to no one but himself for any fraud or violation of his fiduciary duties under California Insurance Code section 1057. The result is a *de facto immunity* that is in direct conflict with California law that has expressly recognized that such immunity is not extended to the Commissioner for fraud, misfeasance or abuse of his "exclusive" powers in the administration of the estate of an insolvent insurer. *Garris v. Mitchell*, 7 Cal.App.2d 430, 46 P.2d 225 (1935).

2. THE DECISIONS OF THE COURTS BELOW EXTEND TOLLING PRINCIPLES TO THE "RE-FILING" OF A SUBSEQUENT CLASS ACTION AFTER A DISMISSAL OF AN INITIAL CLASS ACTION, AND EMBRACE THE MINORITY VIEW IN A SPLIT IN THE CIRCUITS REGARDING THE TOLLING DOCTRINES ANNOUNCED BY THIS COURT IN *AMERICAN PIPE* AND , *CORK*

The lower courts have condoned a dismissal on condition of tolling agreements and tolling principles that are in the minority view and in direct conflict with the opinions of other circuits regarding the extension of the application of the tolling doctrines of this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and , *Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). If the present petition is not granted, both the present claims and the anticipated "re-filing" of policyholders' claims are precluded under the majority view where, for example, the three year statute of limitations for fraud under California law (Cal. Code Civ. Proc. § 338(d)) has already run its course as of February 2002.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. (Footnotes omitted).

In , *Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) this Court reiterated the tolling rule in *American Pipe* and held that the filing of a class action tolled the applicable statute of limitations for all asserted members of the class until class certification is denied, and that after dismissal of the original class action, class members may file individual

actions or intervene as plaintiffs in the pending action. *Id.* at 353-354

What *American Pipe* and , *Cork* left unsettled was whether the tolling rule established by this Court applies to allow the filing of a subsequent class action by class members. A split in the circuits exists as to whether tolling of the statute of limitations applies to class members individually only or whether it also applies to subsequent class actions filed after denial of class certification or dismissal of the class action.

The Ninth Circuit in *Catholic Social Services, Inc. v. INS,* 232 F.3d 1139 (9th Cir. 2000) (en banc), extended the tolling rule established in *American Pipe* and , *Cork* and held that the statute of limitations was tolled during the pendency of an earlier class action for class members and would-be class members in a subsequent class action and that plaintiffs may aggregate their individual actions into a new class action (when plaintiffs are not attempting to cure the deficiency in an earlier certification). *Id.* at 30. However, the dissent in *Catholic Social Services* defined the conflict that such a view has with the majority view espoused by other circuits. "The majority raises *a conflict with the law of every circuit* that has decided a *question of national significance*. The question is whether filing a class action tolls the statute of limitations for purposes of filing a subsequent class action." *Id.* at 43 (emphasis added).

The dissent also recognized that the Supreme Court in , *Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) allowed putative class members to bring individual lawsuits for a period of time left on the statute of limitations clock at the time the class action suit was filed where the class action failed before reaching the merits. However, it was noted that the Supreme Court has said nothing about filing successive class actions and "strongly implied that filing a subsequent class action is not an option for class members once a class is dismissed." *Id.* at 44; *See also* , *Cork, supra*, 462 U.S.

at 354.

Apart from the minority view of the Ninth Circuit (in *Catholic Social Services)* it is recognized that "every circuit to have considered the issue . . . has held that the rationale of, *Cork* does not permit *the filing of a second or subsequent class action once the original statute of limitations has run.*" *Id.* at 45 (emphasis added).[8] Other circuits have held that the Supreme Court decision in , *Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) does not extend to include class members who file subsequent class actions. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 17 (1st Cir. 1998), *cert. denied*, 525 U.S. 870 (1998); *Korwek v. Hunt*, 827 F.2d 874 (2nd Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994), *cert. denied* 513 U.S. 1077, 115 S.Ct. 723, 130 L.Ed.2d 628 (1995); *see also Robbin v Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (citations omitted).

If the opinions below are left to stand on the issue of deferring the standing of policyholders via a conditional dismissal subject to tolling principles, then this Court's review is necessary to resolve the conflict between the circuits interpreting the tolling rule established by this Court in *American Pipe* and , *Cork.* This petition is the vehicle for such resolution where the instant action involves the dismissal of an uncertified subsequent class action subject to a tolling order and tolling principles that anticipate the re-filing of a subsequent class action that is

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[8]Legal authorities have noted the Ninth Circuit's view as the minority view and as a departure from the rationale in , *Cork. See, e.g.*, Recent Case, *Civil Procedure - Class Actions - Ninth Circuit Holds That Prior Class Action Tolled the Statute of Limitations for New Class Action Claim. - Catholic Social Services v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), 114 Harv. L. Rev. 2576 (2001).

otherwise time-barred.

3. THE DECISIONS OF THE COURTS BELOW ADOPT THE MINORITY VIEW AND CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, INCLUDING THE NINTH CIRCUIT, ON THE IMPORTANT FEDERAL ISSUE OF WHETHER PENDENT JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT (28 U.S.C. § 1441(d)) IS REQUIRED WHERE THE FOREIGN SOVEREIGN REMAINS A PARTY TO THE ACTION

The lower courts have erroneously adopted the minority view on an important issue of federal law in upholding the discretion of the district court to decline to exercise pendent jurisdiction over an entire action where a foreign sovereign has removed the case to federal court pursuant to 28 U.S.C. § 1441(d), particularly where the foreign sovereign remains as a party defendant.

The Foreign Sovereign Immunities Act (FSIA) entitles foreign states to immunity from the jurisdiction of courts in the United States (28 U.S.C. § 1604) subject to certain enumerated exceptions (28 U.S.C. § 1605). Federal jurisdiction under the FSIA is afforded when a foreign sovereign waives immunity or engages in commercial activity. (*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818,831 1989); 28 U.S.C §§ 1605(a)(1) and (2)). The FSIA's removal provision states:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall

be tried by the court without jury.

28 U.S.C. § 1441(d).

There have been conflicting opinions between the federal circuit courts that have interpreted the language of the FSIA removal provision. In the majority of jurisdictions, the courts have determined that the FSIA requires the exercise of jurisdiction to hear not only claims against foreign states, but also requires jurisdiction be exercised as to all claims against other parties that do not otherwise qualify for federal jurisdiction particularly where the foreign sovereign remains a party (*e.g., Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-66 (5th Cir. 1990), *cert. denied*, 499 U.S. 962, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); *In re Air Crash Disaster Near Roselawn Indiana*, 96 F.3d 932 (7th Cir. 1996); *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992).)

The minority view (followed in *Carranza I*) defines the conflict between the circuits in holding that the FSIA does not confer pendent party jurisdiction over claims that do not otherwise qualify for federal jurisdiction. The Fourth Circuit has so construed the scope of removal jurisdiction under section 1441(d) in *Schlumberger Industries, Inc. v. National Surety Corp.*, 36 F.3d 1274 (4th Cir. 1994). In holding that the FSIA did not confer pendent party jurisdiction over non-foreign state co-defendants, the court primarily based its holding on the FSIA's original jurisdiction provision, 28 U.S.C. § 1330(a); and also on its interpretation of section 1441(d) .

The policies behind the majority view include the avoidance of risk that state court proceedings pose to a foreign sovereign's interests; that when a foreign sovereign exercises removal rights under section 1441(d) the district court is required to exert jurisdiction as to all claims in the case to insure the

foreign sovereign's interests are fully protected by the availability of one federal forum; and that judicial economy and the avoidance of inconsistent outcomes are best served by having all of plaintiff's claims heard in one federal forum. *See* Article, *Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. Int'l L.J. 71 (1998). Moreover, Congress, acting through the FSIA, did not intend to provide additional defenses to foreign sovereign defendants by a procedural severance and remand of co-defendants to state court where inconsistent outcomes are at risk. In the present proceedings, a remand of any claims to the state Conservation Court was inappropriate where the claims concerned the illegal transfer of ELIC assets to the foreign sovereign defendant (Credit Lyonnais) that the Conservation Court knew was a foreign sovereign, and particularly where the Conservation Court approved the transfer of such assets without obtaining any waiver from Credit Lyonnais from the protections of the FSIA.

In the instant case, the courts below have disregarded both the majority and Ninth Circuit views and have sanctioned the minority view in dismissing policyholders' pendent claims in *Carranza I*, forcing the re-filing of such claims in *Carranza II* in the state Conservation Court without naming or including the foreign sovereign defendants Credit Lyonnais and CDR. Prejudice resulted in the loss of claims against Credit Lyonnais and CDR in *Carranza II*. Additional prejudice resulted from the unnecessary fiction imposed by the district court that policyholders would have to seek (and obtain) "leave to sue" from the state's Conservation Court, whose refusal the district court relied on in denying standing to policyholders[9] [App. 50a].

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[9] California law specifically recognizes that the failure to obtain "leave to sue" in advance of the filing of such an independent action as *Carranza I* or *Carranza II* is not a jurisdictional defect; that the defect can be cured at any stage of the

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted in both *Carranza I* and *Carranza II*.

Respectfully submitted,

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proceedings; and that leave to sue may not be refused where (1) it would cut-off the rights of beneficiaries, or (2) where the Conservation Court could not provide the same relief (e.g. as against Credit Lyonnais or CDR) that the independent action (in federal court) could, or (3) where the existence of a separate statute or constitutional provision (e.g. the FSIA) requires that a particular action be brought in another (federal) jurisdiction. (*See Vitug v. Griffin*, 214 Cal.App.3d 488, 493, 262 Cal.Rptr. 588 (1989); *Ostrowski v. Miller*, 226 Cal.App.2d 79, 84, 37 Cal.Rptr. 790 (1964).) All three grounds apply in the instant case.

FILED
APR 24 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO CARRANZA-HERNANDEZ, Plaintiff-Appellant, INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, Intervenor-Appellee, v. ALTUS FINANCE CORPORATION; CREDIT LYONNAIS; AURORA NATIONAL LIFE ASSURANCE COMPANY; CDR ENTERPRISES, INC.; OMNIUM GENEVE SA; NEW CALIFORNIA LIFE HOLDINGS, INC.; ARTEMIS, S.A. Defendants-Appellees.	No. 00-55839 D.C. No. CV-99-08375-AHM MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 6, 2001
Pasadena, California

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges.

COUNSEL:

For SERGIO CARRANZA HERNANDEZ, Plaintiff - Appellant: Timothy D. Cohelan, Esq., COHELAN & KHOURY, San Diego, CA.

For SERGIO CARRANZA HERNANDEZ, Plaintiff - Appellant: Thomas D. Schaefer, Esq., Cardiff by the Sea, CA.

For INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, Intervenor - Appellee: Steven J. Green, DAG, DEPARTMENT OF INSURANCE, Karl D. Belgum, Esq., Helen Conroy, Gary L. Fontana, Esq., THELEN, REID & PRIEST LLP, San Francisco, CA.

For CREDIT LYONNAIS, Defendant - Appellee: Travers D. Wood, Esq., WHITE & CASE, Los Angeles, CA.

OPINION:

Sergio Carranza-Hernandez ("Carranza") filed this action in San Diego County Superior Court against defendants Altus Finance ("Altus"), Credit Lyonnais ("CL"), Aurora National Life Assurance Company ("Aurora"), CDR Enterprises

("CDR"),[1] Omnium Geneve SA ("Omnium"), New California Life Holdings, Inc. ("New California"), Artemis SA ("Artemis"), Mutuelle Assurance Artisanale de France ("MAAF") and MAAF Vie. The action was brought on behalf of a class of beneficiaries of structured settlement annuities ("SSA's") issued by Executive Life Insurance Company ("ELIC"), which was the subject of rehabilitation proceedings in the Los Angeles County Superior Court ("Conservation Court").

The Conservation Court approved a plan of rehabilitation ("the Plan") for ELIC, which was later modified. ELIC's insurance business, including the SSA held by Carranza, was sold to a consortium of investors headed by MAAF and Omnium. According to the Plan, the MAAF-led consortium incorporated New California, which in turn functioned as the sole shareholder of Aurora. Aurora took over ELIC's insurance policies, including the SSA's issued by ELIC.

Following removal, the district court dismissed Carranza's action for lack of jurisdiction and lack of standing. The district court correctly concluded that the California Insurance Commissioner has exclusive standing under California law to bring the claims asserted in Carranza's action. *See Garamendi v. Executive Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 584 (Cal. Ct. App. 1993).

Denial of a request for leave to amend is reviewed for abuse of discretion. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001). The district court is afforded considerable deference in determining whether a party's motion to amend a complaint should be granted. *Id.* Leave to amend need not be granted where amendment would be futile. *Bowles v. Reade,* 198 F.3d 752, 757 (9th Cir. 1999). The district court did not abuse its discretion in denying Carranza's Motion to Amend.

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[1]CDR is a successor of Altus.

AFFIRMED.[2]

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[2]The Motion Of Appellees To (1) Strike New Argument In Appellant's Reply Brief or (2) Accept This Motion As The Response To Appellant's New Argument is DENIED.

FILED
MAY 13 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO CARRANZA-HERNANDEZ; KATHLEEN ELIZABETH WATSON, an incompetent, by and through her Guardians ad Litem VINCENT F. WATSON and SUSAN L. WATSON, both individually and on behalf of all other similarly situated,
Plaintiffs-Appellants,
v.
ARTEMIS S.A.; ALTUS FINANCE, S.A.; AURORA NATIONAL LIFE ASSURANCE COMPANY; NEW CALIFORNIA LIFE HOLDINGS, INC.; MUTUELLE ASSURANCE; MAAF VIE, OMNIUM GENEVE S.A.; LEON BLACK, APOLLO ADVISORS, INC.; FRANCOIS PINAULT, SDI VENDOME S.A.; CHAURAY VALEURS S.A.; FINANCIERE DU PACIFIQUE SNC; STATE OF CALIFORNIA, JOHN GARAMENDI; CHUCK QUACKENBUSH,
Defendants-Appellees.

No. 01-55075

D.C. No. CV-00-09593-AHM

MEMORANDUM*

*This disposition is not appropriate for publication an may not be

cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 6, 2001
Pasadena, California

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges.

COUNSEL:

For SERGIO CARRANZA-HERNANDEZ, KATHLEEN ELIZABETH WATSON, Plaintiffs - Appellants: Timothy D. Cohelan, Esq., COHELAN & KHOURY, San Diego, CA.

For KATHLEEN ELIZABETH WATSON, Plaintiff - Appellant: Thomas D. Schaefer, Esq., Cardiff by the Sea, CA.

For ARTEMIS S.A., ALTUS FINANCE, S.A., AURORA NATIONAL LIFE ASSURANCE COMPANY, NEW CALIFORNIA LIFE HOLDINGS, INC., MUTUELLE ASSURANCE, MAAF VIE, OMNIUM GENEVE S A, LEON BLACK, APOLLO ADVISORS, INC., FRANCOIS PINAULT, S D I VENDOME S A; CHAURAY VALEURS S A; FINANCIERE DU PACIFIQUE S N C, STATE OF CALIFORNIA, JOHN GARAMENDI; CHUCK QUACKENBUSH, Defendants - Appellees: Robert A. Holland, Esq., SIDLEY AUSTIN BROWN & WOOD, Los Angeles, CA.

For ARTEMIS S.A., ALTUS FINANCE, S.A., AURORA

NATIONAL LIFE ASSURANCE COMPANY, NEW CALIFORNIA LIFE HOLDINGS, INC., MUTUELLE ASSURANCE, MAAF VIE, OMNIUM GENEVE S A, LEON BLACK, APOLLO ADVISORS, INC., FRANCOIS PINAULT, S D I VENDOME S A; CHAURAY VALEURS S A; FINANCIERE DU PACIFIQUE S N C, STATE OF CALIFORNIA, JOHN GARAMENDI; CHUCK QUACKENBUSH, Defendants - Appellees: Richard D. Bernstein, Esq., SIDLEY AUSTIN BROWN & WOOD, Washington, DC.

For AURORA NATIONAL LIFE ASSURANCE COMPANY, NEW CALIFORNIA LIFE HOLDINGS, INC., Defendants - Appellees: Theodore N. Miller, SIDLEY AUSTIN BROWN & WOOD, Los Angeles, CA.

For STATE OF CALIFORNIA, JOHN GARAMENDI; CHUCK QUACKENBUSH, Defendant - Appellee: Jennifer R. McGlone, THELEN, REID & PRIEST LLP, San Francisco, CA.

OPINION:

In a related action (No. 00-55839) Sergio Carranza-Hernandez ("Carranza") asserted claims based on a rehabilitation plan for Executive Life Insurance Company. Carranza and co-plaintiff Elizabeth Watson filed this similar action on July 21, 2000, in Los Angeles County Superior Court. The case was removed to federal district court on September 7, 2000, by defendants/appellees Aurora National Life Assurance Company and New California Life Holdings, Inc.. On December 4, 2000, the district court dismissed this action pursuant to defendants/appellees' Rule 12(b)(6) Motion to Dismiss for the same reason that it dismissed the related action: the California Insurance Commissioner has exclusive standing to bring the asserted claims. *See Garamendi v. Executive Life Ins. Co.*, 21

Cal. Rptr. 2d 578, 584 (Cal. Ct. App. 1993).
AFFIRMED.[1]

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[1]Appellees' Supplemental Request For Judicial Notice In Support Of Brief Of Appellees Aurora National Life Assurance Company and New California Life Holdings, Inc. filed on June 26, 2001, and Appellants' Supplemental Request For Judicial Notice RE: Interim Events filed October 31, 2001, are DENIED.

FILED
JUN 27, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO CARRANZA-HERNANDEZ, Plaintiff-Appellant, INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, Intervenor-Appellee, v. ALTUS FINANCE CORPORATION; CREDIT LYONNAIS; AURORA NATIONAL LIFE ASSURANCE COMPANY; CDR ENTERPRISES, INC.; OMNIUM GENEVE SA; NEW CALIFORNIA LIFE HOLDINGS, INC.; ARTEMIS, S.A. Defendants-Appellees.	No. 00-55839 D.C. No. CV-99-08375-AHM Central District of California, Los Angeles ORDER

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges

The panel has voted unanimously to deny the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for panel rehearing and rehearing en banc filed on May 7, 2002 is DENIED.

FILED
JUN 27, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO CARRANZA-HERNANDEZ, et al., Plaintiffs-Appellants, v. ARTEMIS S.A., et al., Defendants-Appellees.	No. 001-55075 D.C. No. CV-00-09593-A HM Central District of California, Los Angeles ORDER

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges

The panel has voted unanimously to deny the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for panel rehearing and rehearing en banc filed on May 24, 2002 is DENIED.

FILED
APR 13, 2000
ENTERED
APR 14, 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO CARRANZA-HERNANDEZ, *et al.*,	)	CASE NO. CV 99-8375 AHM (CWx)
Plaintiffs,	)	AMENDED ORDER GRANTING DEFENDANTS
v.	)	AURORA NATIONAL LIFE ASSURANCE COMPANY'S
ALTUS FINANCE CORPORATION, *et al.*,	)	AND NEW CALIFORNIA LIFE HOLDINGS, INC.'S
Defendants.	)	MOTION TO DISMISS FOR LACK OF JURISDICTION AND FURTHER GRANTING THEIR, DEFENDANT CREDIT LYONNAIS' AND INTERVENOR COMMISSIONER'S RESPECTIVE MOTIONS TO DISMISS ON THE BASIS THAT PLAINTIFF LACKS STANDING

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I. INTRODUCTION

A. Prior Proceedings Before This Court And Motion For Reconsideration

This case arises out of the collapse and insolvency of Executive Life Insurance Company ("ELIC"). Plaintiff is Sergio Carranza-Hernandez ("Carranza-Hernandez"). The defendants are Altus Finance S.A. ("Altus"); Credit Lyonnais S.A. ("Credit Lyonnais"); CDR Enterprises, Inc. ("CDR"); Mutuelle Assurance Artisanale de France (MAAF "); MAAF Vie S.A ("MAAF Vie"); Omnium Geneve S.A. ("Omnium"); Artemis S.A. ("Artemis"); Aurora National Life Assurance Company ("Aurora") and New California Life Holdings, Inc. ("New California"). Aurora and New California (collectively, the "moving Defendants") have moved to dismiss the complaint on several grounds, including absence of subject matter jurisdiction and Plaintiff's lack of standing. Credit Lyonnais joined in their motion on only one ground (Plaintiff's lack of standing). Chuck Quackenbush, the California Insurance Commissioner, moved to intervene, in order to join in the challenge to Plaintiffs standing. The Court held a hearing on January 24, 2000. Although at that point the court had not ruled on the Insurance Commissioner's intervention motion, his counsel was permitted to argue.

On February 1, 2000, the Court granted moving Defendants' motion to dismiss for lack of subject matter jurisdiction, concluding that Carranza-Hernandez was seeking to assert in this forum claims that he is entitled to assert only in "the Conservation Court" (a proceeding underway in the Los Angeles Superior Court and described more fully below). As a result of that ruling, the Court deemed it unnecessary to address either the moving defendants' or Credit Lyonnais' challenges to Plaintiff's standing.

On February 18, 2000, Credit Lyonnais moved for reconsideration, arguing that the Court had incorrectly concluded that only the Conservation Court had jurisdiction over all of

Plaintiff's claims, including those against Credit Lyonnais.

On February 28, 2000, the Insurance Commissioner filed a response to Credit Lyonnais' motion and renewed his request to intervene. The Court granted the Commissioner's motion to intervene on March 7, 2000 and on March 9, 2000 the Court vacated its February 1, 2000 order and took Credit Lyonnais' motion for reconsideration under submission.

In seeking dismissal under Rule 12(b)(1) (lack of subject matter jurisdiction), Aurora and New California argued that the Conservation Court had asserted exclusive jurisdiction over Plaintiff's claims and that its rulings were entitled to Full Faith and Credit. In its February 1, 2000 order, this Court agreed. Credit Lyonnais, however, argued that the claims against it could only be litigated in federal court, under the Foreign Sovereign Immunities Act ("FSIA"). Given that *Chuidian v. Phillipine National Bank,* 912 F.2d 1095, 1098-99 (9th Cir. 1990), held that in actions properly removable under the FSIA,[1] the entire action is removed, Credit Lyonnais further argued that this Court was required to assert jurisdiction over the entire action. This Court reached a different conclusion: that the McCarran-Ferguson Act precluded it from exercising jurisdiction, notwithstanding the FSIA. The Court applied the three-part test articulated in *United States Treasury Dep't v. Fabe*, 508 U.S. 491, 501 (1993) and determined that (1) the FSIA did not "specifically relate to the business of insurance," (2) the California Insurance Code was enacted "for the purpose of regulating the business of insurance" and (3) the application of the FSIA would "invalidate, impair, or supersede" the California Insurance Code. Because the Court found that the Full Faith and Credit Clause and the McCarran-Ferguson Act precluded it from exercising jurisdiction, the Court dismissed Plaintiff's action without prejudice to his filing this

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[1]As is described more fully below, Credit Lyonnais had removed this action from state court to federal court.

action in the Conservation Court. Given that result, the Court did not address the challenges to Plaintiff's standing.

In its Motion for Reconsideration, Credit Lyonnais asserts that it has an absolute right to removal under the FSIA and that the FSIA preempts the McCarran-Ferguson Act. It relies on *Stephens v. National Distillers and Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1996). Since the Court does have jurisdiction, Credit Lyonnais continues to argue, it should dismiss Plaintiff's action on the ground that he lacks standing because "the Insurance Commissioner of the State of California, in his capacity as Conservator, Rehabilitator, and Liquidator of Executive Life Insurance Company, has exclusive standing to bring the claims, erroneously asserted by Plaintiff." Credit Lyonnais' Partial Joinder in Defendants Aurora' s and New California's Motion to Dismiss at 2:6-9. MAAF and MAAF Vie join Credit Lyonnais' Motion for Reconsideration.

In the Insurance Commissioner's Response to Credit Lyonnais's Motion for Reconsideration, the Insurance Commissioner states "[T]he Commissioner agrees with Credit Lynonnais' [sic] argument that the McCarran-Ferguson Act does not override the Foreign Sovereign Immunities Act ("FSIA"), and that this Court has jurisdiction over this action based on the FSIA." The Insurance Commissioner therefore also requests that the Court dismiss this action on the ground that the Plaintiff lacks standing.

Aurora and New California oppose Credit Lyonnais' Motion for Reconsideration on two grounds. First, they assert that Credit Lyonnais is bound by the Conservation Court's orders regarding its exclusive jurisdiction and that this Court correctly ruled that the Full Faith and Credit Clause altogether precludes this Court from exercising jurisdiction. Second, they argue that the McCarran-Ferguson Act does preclude this Court from exercising jurisdiction under the FSIA, notwithstanding *Stephens v. National Distillers and Chemical Corp.* Alternatively, Aurora

and New California assert that if the Court finds that the FSIA preempts the McCarran-Ferguson Act, the Court should nevertheless dismiss Plaintiff's claims against them. Artemis joins in their position.[2] Altus, Omnium and CDR have not filed any papers in support of or opposition to Credit Lyonnais' motion for reconsideration.

Plaintiff also opposes Credit Lyonnais' Motion for Reconsideration, on the ground that the motion does not satisfy the requirements of Local Rule 7.16. Plaintiff goes on to argue that even if the Court does reconsider its February 1, 2000 Order, it should find that he has standing to pursue this action.

B. Summary Of This Order

As Justice Jackson once good-naturedly confessed, "Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable, and perhaps misled others . . . . Baron Bromwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then."' *McGrath v. Kristensen*, 340 U.S. 162, 176-78 (1950) (Jackson, J., concurring).

Here, too, these matters now appear considerably different to the Court. To start with, in the Court's now-vacated February 1, 2000 Order, the Court anticipated that even if Plaintiff filed this case in the Conservation Court, Credit Lyonnais might come right back and remove it again. So in footnote three the Court implored Credit Lyonnais not to exercise its right "to remove this action a second time." In thus attempting to cut through the procedural morass this complex case has created, the Court erred in at least three respects. First,

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[2]Artemis had not yet appeared in this case at the time the initial dismissal motions before this Court were filed. Given the nature of and basis for this Court's rulings, this Order encompasses Artemis as well.

Credit Lyonnais is correct that *Stephens v. National Distillers and Chemical Corp., supra,* establishes that the FSIA preempts the McCarran-Ferguson Act. Second, the Court should have anticipated that Credit Lyonnais would resist the Court's exhortation not to bring this case back to federal court. Third, in retrospect and especially in light of the preceding consideration, the Court should have dealt with the challenges to Plaintiff's standing, because in the event they are meritorious - - and they are - - then the ridiculous prospect that the Court sought to avoid (namely, forcing Plaintiff to litigate his claims simultaneously in two different courts) will be avoided anyway. Given these conclusions, the Court grants Credit Lyonnais' motion for reconsideration.

What follows next, then, is an overview of this amended order.

1. **Jurisdiction as to All Defendants Except Defendant Credit Lyonnais**

With the exception of Defendant Credit Lyonnais, there is no change in the, prior outcome -- Plaintiff's claims are dismissed without prejudice to his filing his action in the Conservation Court (if on appeal or otherwise he establishes, contrary to this Court's conclusion, that he does have standing). However, some of the Court's language and analysis has changed, The result technically is not a remand, because even if Plaintiff has standing, the Court is not sending this action back to the San Diego Superior Court, from which it was removed. Instead, if Plaintiff does have standing, he has the option of filing this action in the Conservation Court as to all defendants except Credit Lyonnais.[3]

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[3]By referring to the "Conservation Court" this Court does not presume to intrude on whether or to whom that court or the California Judicial Council may reassign this action in light of other related actions that may be pending in the state court system.

2. Jurisdiction as to Defendant Credit Lyonnais

As discussed more fully below, Credit Lyonnais qualifies as a foreign sovereign for purposes of the FSIA. Therefore, it has an absolute right to removal of Plaintiff's claims against it and to defend itself in federal court. Nevertheless, the Court has "discretion to remand to state court the portion of the action that relates to defendants as to whom there is no independent basis for subject matter jurisdiction." 14C Wright, Miller & Cooper, Fed. Prac. Proc. § 3 729.1 at 242 (1998) (citing cases); *see also Birkinshaw v. Armstrong World Indus.*, 715 F. Supp. 126 (E.D. Pa. 1989); *cf. Admiral Ins. Co. v. L'Union des Assurances de Paris Incendie Accidents*, 758 F. Supp. 293 (E.D. Pa. 1991)

Notwithstanding these authorities, Credit Lyonnais argues that the Court does not have discretion to dismiss Plaintiff's claims against the other defendants, citing *Chuidian, v, Philippine National Bank*, 912 F.2d 1095 (9' Cir. 1990); *Teledyne, Inc. v. Kone Corp.*, 892 F/2d 1404 (9th Cir. 1990); and *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992). These cases are not persuasive. First, in *Chuidian*, while the Ninth Circuit held that "section 144 1(d) requires, in the case of a removal by a foreign sovereign, that the federal court *initially* exercise jurisdiction over claims against co-defendants even if such claims could not otherwise be heard in federal court," 912 F.2d 1095 (emphasis added), the court did not preclude the remand or dismissal of claims against co-defendants after the initial exercise of jurisdiction over the entire case. Second, in *Teledyne* the court merely held that the FSIA authorizes pendent party jurisdiction in cases removed under section 1441(d). *Teledyne*, 892 F.2d at 1409. That holding is irrelevant to the question of whether the district court separately has discretion to dismiss or remand to state court the claims against the non-foreign sovereign co-defendants. Finally, *Surinam Airway, supra*, is distinguishable. In that case, after an

airplane crash killed their decedents, plaintiffs filed wrongful death actions in state court against various Florida corporations and the estates of the deceased cockpit crew. One of the named defendants impleaded Surinam Airways into each action as a third-party defendant, asserting indemnity, contribution, and breach of contract claims. Surinam Airways removed the case to federal court pursuant to section 1441(d). The district court remanded plaintiff's claims but retained jurisdiction over the third party claims asserted against Surinam Airways. The Eleventh Circuit rejected the district court's remand and stated that "[a]llowing the district court discretion to remand part of a case involving a sovereign foreign defendant would defeat Congress' intent to grant foreign sovereigns the absolute right to defend civil actions against them in federal court." *Surinam Airways* at 1260. This is the language on which Credit Lyonnais relies, but it is inapplicable. First, in this case Plaintiff has sued Credit Lyonnais directly, not as a third party defendant. Unlike in *Surinam Airways*, no other defendant has asserted cross-claims against Credit Lyonnais (such as for indemnity, contribution or breach of contract) that are inextricably intertwined with the Plaintiff's claims against such defendants. In fact, as Aurora and New California note, "Credit Lyonnais' ability to defend itself against Plaintiff's claims does not depend in any way upon Aurora's or New California's being a party in the same proceeding." Aurora Opposition to Motion for Reconsideration at 14:26-15:2. Credit Lyonnais does not dispute this assertion. Second, unlike in this case the district court in *Surinam Airways* did not conclude that it lacked jurisdiction over the claims of the plaintiffs; to the contrary, it concluded that it did have jurisdiction under 28 U.S.C. § 1367. The district court's decision to remand was based on its exercise of what it deemed to be its discretionary authority. Thus, the Eleventh Circuit was not even asked to, much less required to, balance conflicting principles of exclusive jurisdiction, as this Court

must do. For these reasons, the Court concludes that while it has jurisdiction over Credit Lyonnais, it may and does dismiss Plaintiff's claims against all other defendants, for lack of subject matter jurisdiction.

3. Standing

The Court finds that Plaintiff lacks standing to sue any of the Defendants because his claims against Defendants fundamentally challenge Defendants' conduct "in connection with the administration, liquidation, or other disposition of the assets of [ELIC]," and as such only the Insurance Commissioner has standing to assert such claims. Cal. Ins. Code § 1037. This conclusion effectively grants the Commissioner the relief he seeks as intervenor.

II. FACTS LEADING UP TO THE FILING OF THESE MOTIONS

A. Plaintiff's Structured Settlement Annuities Issued By ELIC

On or about August 4, 1981, Plaintiff filed a lawsuit for personal injuries he sustained when he fell into negligently stored, combusting cotton debris. First Amended Complaint ("FAC") at ¶ 24. (The complaint does not allege who he sued.) The action was partially resolved by the purchase of structured settlement annuities ("SSA's") issued by ELIC on August 1, 1983. FAC at ¶ 25. The SSA's called for payments of $150,000 on August 1, 1998 and $363,544 on August 1, 2008. On August 1, 1998, Plaintiff received a payment of $123,750 (82.5% of $150,000). FAC at ¶ 25. Plaintiff was paid less than provided in the SSA's because after the issuance of the SSA's, ELIC became insolvent and underwent conservation and rehabilitation proceedings.

B. The ELIC Conservation and Rehabilitation Proceedings

On April 11, 1991, the California Insurance Commissioner, then John Garamendi, took over ELIC and

placed it in rehabilitation proceedings. Aurora Def. Exh. A[4], FAC ¶ 26. The conservation and rehabilitation proceedings concerning ELIC were conducted under the supervision of the Honorable Kurt J. Lewin, Judge of the California Superior Court for the County of Los Angeles (the "Conservation Court"). Aurora's and New California's Motion to Dismiss ("Aurora Motion") at 3:6-9. On the day the Insurance Commissioner first went to court, the Conservation Court issued an "Order Appointing Conservator [the Insurance Commissioner became Conservator], Establishment of Procedures, Issuance of Injunctions and Related Orders (the "Conservation and Stay Order")." Aurora Def Exh. A. The Conservation and Stay Order provides:

> 1. [T]his Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting such Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the policyholders and other creditors of Respondent [ELIC was the Respondent]
>
> . . . .
>
> 3. It being found that it is essential to the safety of the public and is in the best interest of the shareholders, policyholders and other creditors of Respondent and to the orderly administration of these proceedings, Respondent and its officers,

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[4]Unless otherwise specified, "Aurora Def. Exh." refers to exhibits to Aurora's and New California's Original Motion to Dismiss.

directors, shareholders, attorneys and attorneys-at-law, agents, affiliates subsidiaries, reinsurers, brokers, third-party administrators, servants and employees *and all other persons, agencies, associations and entities are hereby enjoined and restrained from: ...*

> b. interfering with theacquisition of [sic] possession by or the exercise of dominion and control over the Property by the Conservator, with the jurisdiction of this Court or with these proceedings; . . .
>
> d. the seeking or obtaining of any preference of any kind or nature, the obtaining of any judgments, foreclosures, attachments, levies or liens of any kind or nature, the exercise of any powers of sale or any rights of set-off, rescission or the like against respondent or the Property except pursuant to the prior orders of this Court, this Court having exercised its exclusive jurisdiction with respect to the Property and any claims and rights asserted with respect to it; . ..
>
> e. *the filing, commencement or prosecution of any new suits, arbitration proceedings, mediations, alternate dispute resolutions or demands or claims*

> *or the continued prosecution of any pending suits, arbitration proceedings, mediations, alternate dispute resolutions or claims with respect to Respondent or the Property other than in this proceeding before this Court unless the prior approval* of *this Court has been granted upon good cause shown; and . . .*
> *g. institution of suits to collect any of the Property or institution of suits which purport to assert derivative rights on behalf of Respondent.*

Aurora Def. Exh. A (footnotes omitted) (emphasis added).

On December 6, 1991, the Conservation Court issued an Order of Liquidation. Aurora Def. Exh. B. The Order of Liquidation reiterated and made permanent the Court's prior injunctions set forth in its April 11, 1991 Conservation and Stay Order. *Id.*

Later on, the Insurance Commissioner, as ELIC's conservator, and the Conservation Court conducted an auction of ELIC's junk bond portfolio and/or for the rehabilitation of ELIC's insurance business. Aurora Motion at 3:11-13; FAC ¶28. This auction produced eight formal bids. Aurora Motion at 3:13-14. In November 1991, the Conservator selected the bid of Altus and the MAAF Group, a consortium of foreign insurers and investment firms. Aurora Motion at 3:14-15.

The Conservation Court approved the Conservator's selection of the Altus/MAAF Group bid on December 26, 1991 and in later rulings. Aurora Motion at 3: 15-16; Aurora Def Exh. C. Subsequently, due to a delay in implementing a plan of rehabilitation, the Conservation Court approved the sale of the

junk bond portfolio to Altus, separate from the plan of rehabilitation. Aurora Motion at 3:17-20; Aurora Def. Exh. D. On March 3, 1 992, the sale of the junk bond portfolio to Altus was consummated. Plaintiff s Opposition to Aurora Motion ("Opp.") at 3:20-21.

With respect to ELIC's insurance assets, the Conservator submitted a rehabilitation plan to the Conservation Court for approval. "According to the terms of the Rehabilitation Plan, the [MAAF Group] was to found Defendant New California [Life Holdings, Inc], which would be the sole shareholder of Defendant Aurora [National Assurance Company], the company that would take over ELIC's insurance policies, including structured settlement annuities and other insurance related assets and liabilities." FAC at ¶ 31. On July 31, 1992, the Conservation Court approved a plan for rehabilitation, including the transfer to Aurora of ELIC's restructured insurance and annuity contracts. Aurora Def. Exh. E.

On August 13, 1993, the Conservation Court issued its Final Order Approving Modified Plan of Rehabilitation ("Final Order"). Aurora Def. Exh. G. The Final Order provides:

> 13. This Court reserves jurisdiction necessary to enforce this Final Order and the Order referenced and incorporated herein. *This Court hereby continues to assert and exercise exclusive jurisdiction over the Modified Plan, over ELIC and over any claim, counterclaim or other action involving a third party relating to any of the Transferred Assets.* All prior orders of this Court including, but not limited to, all injunctions and restraining orders, are hereby affirmed and continued in full force and effect except to the extent inconsistent with this Final Order.

Aurora Def. Exh. G (emphasis added).

Following the issuance of the Final Order Approving Modified Plan of Rehabilitation and the transfer of ELIC's assets to Aurora, several third parties filed various lawsuits against Aurora related to the transferred assets. Aurora Def. Exh. J. In response, on March 17, 1994, the Conservator filed an *ex parte* application for an Order Clarifying Exclusive Jurisdiction of Court and Applicability to Aurora of Previously Issued Injunctions and Restraining Orders ("Clarifying Order"). Aurora Def Exh. J. On March 22, 1994, the Conservation Court granted the Conservator's *ex parte* application and issued a Clarifying Order. Aurora Def Exh. J. In the Clarifying Order, the Conservation Court once again reiterated its exclusive jurisdiction over ELIC-related claims and assets, extended its exclusive jurisdiction to claims against Aurora, enjoined persons from bringing such claims and continued "in full force and effect" its prior injunctions. Aurora Def Exh. J. The Clarifying Order provides:

> 1. This Court hereby continues to assert and exercise exclusive jurisdiction over the Modified Plan, over ELIC . . . and over any claim, counterclaim or other action against ELIC . . . *Aurora or other third party which arises out of action taken . . . by the Rehabilitator . . . or otherwise and which relates to any of the transferred assets*, wherever situated or however held (the Property") . . .

Aurora Def Exh. J (emphasis added).

On February 15, 1995, the California Court of Appeals affirmed the Conservation Court's August 13, 1993 Final Order. *In re Executive Life Ins. Co.*, 32 Cal. App.4th 344 (1995). In that opinion, the California Court of Appeals stated that "[t]he rehabilitation of ELIC . . . is a continuing process." *Id.* at 358.

(It is undisputed that the California Supreme Court denied review on May 11, 1995.) The Special Deputy Insurance Commissioner confirms that "[t]he conservation, liquidation and rehabilitation of ELIC is on-going and not complete." Declaration of Richard G. Krenz at ¶¶3-4; *See* Declaration of Theodore N. Miller at ¶ 13 (The Conservation Court currently continues to exercise jurisdiction concerning the implementation of the Modified Plan of Rehabilitation).[5]

It is undisputed that Defendant Credit Lyonnais never was named as a party in the Conservation Court proceedings, although the Commissioner asserts that it provided him with documents on which it knew the Conservation Court would rely.

C. The Insurance Commissioner's Action

On February 17, 1999, the Insurance Commissioner as Conservator of ELIC filed an action in the California Superior Court for the County of Los Angeles against Altus, CDR, MAAF, MAAF Vie, Omnium, Credit Lyonnais, Jean-Claude Seys, Jean-Francois Henin and Jean Irigoin ("Commissioner's complaint" or "Commissioner's action"). On March 18, 1999, Credit Lyonnais and CDR removed the Commissioner's action to this Court on the basis of diversity jurisdiction and the removal provisions of the Foreign Sovereign Immunities Act

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[5]In his Opposition to the Commissioner's Motion to Dismiss, Plaintiff "assumes the administration of the ELIC estate to be complete [and] title to ELIC's assets to be transferred. . . ." Opposition to Commissioner's Motion at 6:13-16. To support this assumption, Plaintiff asserts: "Note, for example, that a Disposition Order, Approving Disposition of Remaining Trust Assets, Approving Trustees' Final Report, and Releasing and Discharging Trustees and the Rehabilitator, and Approving Severance Payment, was filed November 15, 1999." *Id.* at 6, n. 2. Plaintiff failed to submit any admissible evidence to support this assertion.

("FSIA"), 28 U.S.C. § 1441(d).[6] The Conservator filed a First Amended Complaint on June 18, 1999, a Second Amended Complaint on September 5, 1999 and a Third Amended Complaint on February 6, 2000.

In the Commissioner's Third Amended Complaint, he alleges claims for, among other things, fraud, conversion and unfair competition. Generally, the Commissioner alleges that the defendants defrauded him by failing to disclose that the true owner of Aurora was Altus, which is owned by Credit Lyonnais, a foreign state, and thus Aurora was prohibited from owning a California insurance company. Had he known of that relationship, the Commissioner alleges, he never would have recommended to the Conservation Court or approved the Altus/MAAF bid and in turn the defendants never would have acquired the ELIC assets. The Commissioner seeks to recover, through restitution, the defendants' allegedly unjustly-derived profits.

D. This Action, The "Carranza-Hernandez Action"

On March 19, 1999, approximately one month after the Commissioner filed his lawsuit, Plaintiff filed a class action[7] in

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[6]The basis for invoking the FSIA was that "a majority of the shares of Credit Lyonnais were owned by the Republic of France." Notice of Removal at ¶ 5. As such, Credit Lyonnais is a "foreign state" for removal purposes under 28 U.S.C. § 1441(d), which provides that "Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending . . . "

[7]The class has not yet been certified under Fed. R. Civ. P. 23.

the California Superior Court for the County of San Diego against Altus, Credit Lyonnais, Aurora, CDR, MAAF, MAAF Vie, Omnium and New California. He alleged causes of action for violations of (1) the Cartwright Act and (2) the Unfair Competition Act. Plaintiff basically claims that defendants' alleged deceptive collusion enabled them to obtain the ELIC assets at a reduced price, derivatively harming policyholders such as Plaintiff. His claims extensively overlap and repeat the Commissioner's allegations. Indeed, Plaintiff admits he first learned of defendants' alleged wrongful acts on February 18, 1999, when the Commissioner announced the filing of the Commissioner's complaint. FAC ¶ 47.

On April 29, 1999, Credit-Lyonnais removed Plaintiff's action to the United States District Court for the Southern District of San Diego on the basis of the removal provisions of the FSIA. On June 10, 1999, Credit Lyonnais filed a motion to transfer the action to this court. On the same date, Aurora and New California moved to dismiss the action. The Insurance Commissioner also moved to intervene and to dismiss the action. On August 4, 1999, the United State District Court for the Southern District of California (1) granted Credit Lyonnais' motion to transfer this action to this Court, (2) denied Aurora's and New California's motion to dismiss, without prejudice, and (3) denied the Insurance Commissioner's motion to intervene and to dismiss, without prejudice. In granting Credit Lyonnais' motion to transfer this action, the Honorable Irma Gonzalez reasoned that the Commissioner's action was already before this Court and that "[t]he Commissioner's complaint is based on substantially the same factual allegations as those made by plaintiff." Aurora Def Exh. K. On October 12, 1999, Plaintiff filed a FAC adding Artemis as a defendant.

Plaintiff himself characterizes his FAC as alleging that "in order to gain control over ELIC's assets at artificially depressed prices, [the consortium that won the bid for ELIC's

assets] concealed the true identities of its members and effectively flipped the bond portfolio to an undisclosed member - defendant Artemis S.A. - by means of a series of secret agreements, transactions, and post-bid transfers, all of which were designed to suppress competition in the sale of and bidding for the assets." Opp. at 4:8-12 (citing FAC ¶¶ 32-47, 51- 53). "As a result of such illegal bid-rigging and anticompetitive activities by the investor consortium, competition in the sale of and bidding for ELIC's assets was in fact restrained, monies paid on ELIC's SSA's were artificially depressed, and Plaintiff's 1998 payment was discounted." Opp. at 4:17-20 (citing FAC ¶¶ 49-54). Plaintiff requests (1) that the Court award damages and costs and (2) "that defendants be enjoined to cease and desist from violations of the Cartwright Act, . . . to make restitution to plaintiff and the members of the Plaintiff class . . . [and] to cease and desist from past, present and future unfair competition." FAC at pp. 19:11-20:14.

III. AURORA'S AND NEW CALIFORNIA'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may bring a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Where state courts have exclusive jurisdiction, federal courts lack jurisdiction. *See International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997) (federal court lacked subject matter jurisdiction where federal statute banning unsolicited telephone calls and facsimile ads authorized suits only in state courts).

Aurora and New California argue that the Conservation Court's assertion of exclusive jurisdiction over claims that relate to ELIC's estate and transferred assets encompasses Carranza-Hernandez's claims. They argue that under the Full Faith and Credit Clause codified in 28 U.S.C. § 1738, this Court must abide by the Conservation Court's orders and hence that this

Court lacks jurisdiction. That is the basis for their motion under Fed. R. Civ. P. 12(b)(1).

Plaintiff does not dispute the validity of the Conservation Court's orders but argues that the Conservation Court's assertion of exclusive jurisdiction does not apply to this action. Nevertheless, first the Court will review the statutory framework behind the Conservation Court's authority to issue such orders. Then the Court will analyze whether the Conservation Court's orders apply to Plaintiff's action. The Court then GRANTS Aurora's and New California's motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1).[8] Carranza-Hernandez is seeking to assert in this forum claims that, at least as to all defendants except Credit Lyonnais, he is required to assert in the Conservation Court.

A. The Statutory Basis For The Conservation Court's Authority

1. California Insurance Code

Under California law, when a court oversees the conservation and rehabilitation of an insolvent insurance company,

> The court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:
>
> (a) Interference with the commissioner or the proceedings.
>
> (b) Waste of assets of such [company].
>
> (c) The institution or prosecution of any actions or proceedings.

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[8]This ruling does not necessarily affect, much less resolve, any question that may later be raised in the Commissioner's action as to whether the Court has jurisdiction over that action.

> (d) The obtaining of preferences, judgments, attachments, or other liens against such [company] or its assets . . .

Cal. Ins. Code § 1020. "Section 1020 reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the commissioner." *Webster v. Superior Court*, 46 Cal.3d 338, 344 (1988). State courts overseeing the reorganization of insolvent insurance companies have broad jurisdiction parallel with bankruptcy courts' jurisdiction in similar circumstance. *Garamendi v. Executive Life Ins. Co.*, 17 Cal.App.4th 504, 519 (1993).

2. Federal Authorization for States to Regulate the Business of Insurance

Congress excluded insurance companies from the category of debtors under the federal bankruptcy law. 11 U.S.C. § 109(b)(2).[9] "In the case of insurnace companies most states have enacted regulatory schemes which include provisions for insolvency. Since these schemes are designed to protect the interests of policy holders and to provide for the adjustment of the rights of creditors and policy holders . . . , Congress enacted [the forerunner of section 109(b)(2)] to preserve the exclusive jurisdiction of the states over the liquidation of insurance companies . . . ." *In re Equity Funding Corporation of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975). To further preserve the states' primary role in the regulation of the business of insurance, Congress later passed the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015. Section 1011 of that Act, entitled "Declaration of policy," provides:

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[9] "A person may be a debtor under chapter 7 of this title only if such person is not - -. . . a domestic insurance company . . . ." 11 U.S.C. 109(b)(2).

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

Congress also provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by an State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . . " 15 U.S.C. § 1012(b). Thus, Congress explicitly relinquished to the states authority over the business of insurance.

B. <u>The Conservation Court's Orders Encompass Plaintiff's Action</u>

Through a series of orders, the Conservation asserted exclusive jurisdiction over matters related to ELIC's conservation and rehabilitation. See references to Aurora De. Exhs. A, B, G, and J, above.

Plaintiff lists several reasons why the Conservation Court's orders and injunction do not apply to his action:

1. The orders and injunctions do not apply to an "action for antitrust injury to his own property." Opp. at 2:11.
1. "Plaintiff has not sued on behalf of the ELIC estate to recover any of ELIC's assets or to undo any part of ELIC's rehabilitation proceedings or plan." Opp. at 7:11-12.
2. "His claims do not arise out of the actions of ELIC or its rehabilitator. Rather they arise out of defendants' anticompetitive action . . . ." Opp. at 7:12-14.

3. "Plaintiff brings his action on his own behalf and as a representative of the SSA Class, alleging antitrust injury to his SSA and the SSA's of the Plaintiff Class." Opp. at 10:3-4.

4. Asserting claims "seven and as half years after the sale of ELIC's assets, cannot conceivably hinder or frustrate the orders of the conservation court or the work of the rehabilitator." Opp. at 13-16.[10]

These contentions rely on distinctions without a difference; they miss the point. The Conservation Court did not limit its assertion of exclusive jurisdiction to claims that "arise out of the actions of ELIC or its rehabilitator," "that are brought on behalf of" the estate, or that are identical to those pursued by the Commissioner. On April 11, 1991, the Conservation Court in it Conservation and Stay Order asserted "sole and exclusive jurisdiction over all the property [of ELIC]" and over the "*filing . . . or prosecution of any . . . suits . . . or claims with respect to the . . . Property . . .*" Aurora Def. Exh. A, ¶ 1 (emphasis added). In the April 11, 1991 Conservation and Stay Order, the Conservation Court defined "Property" as "all of Respondent's {ELIC's] assets, books, records, property, real and personal, including all property or ownership rights, choate or inchoate, whether legal or equitable of any kind or nature, wherever situated or however held, *including but not limited to . . . evidences of indebtedness*." Aurora Def. Exh. A, ¶ 1 (emphasis added). In its August 13, 1993 Final Order, the Conservation Court reserved "exclusive jurisdiction" over "ELIC and over *any*

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[10]Plaintiff also argues that federal courts have an obligation to hear cases within its jurisdictional grant. The cases cited by Plaintiff to support that argument are abstention cases. The Court would first have to find that it has jurisdiction before it could decide whether to abstain.

claim, counterclaim or other action involving a third party relating to any of the Transferred Assets." Aurora De. Exh. G (emphasis added). On March 22, 1994, the Conservation Court issued a Clarifying Order and confirmed that is reservation of exclusive jurisdiction applied to "any claim, counterclaim or other action against ELIC. . . , *Aurora or other third party* which arises out of action taken. . . by the Rehabilitator . . .*or otherwise and which relates to any of the transferred assets*, wherever situated or however held." Aurora Def. Exh. J (emphasis added).

The threshold question, then, is whether Plaintiff's action relates to or arises out of ELIC's property or the transferred assets. At the hearing on this motion and afterward Plaintiff's counsel argued that an SSA is a liability, not an asset. But that misses the point. The Conservation Court did not assert exclusive jurisdiction only over lawsuits brought by parties who *acquired* ELIC's assets, but over lawsuits "relat[ing] [a very broad term] to any of the transferred assets." That this is such a lawsuit is vividly confirmed by what plaintiff himself alleges in ¶ 30 of the FAC:

> 30. Under the ELIC Rehabilitation Plan:
>
> c. ELIC's bond portfolio was to be sold to ALTUS with the participation of CREDIT LYONNAIS in exchange for money that would be available for distribution to creditors of ELIC, including ELIC *structured settlement annuitants*; and
>
> d. ELIC's insurance businesses including the *structured settlement annuities*, in turn, were to be sold to an entity that was represented as separate and distinct from ALTUS, a consortium of investors headed by MAAF and including Defendants MAAF VIE and OMNIUM

GENEVE. (emphasis added).

In his opposition papers, moreover, Plaintiff's described his First Amended Complaint as follows:

> [I]n order to gain control over ELIC's *assets* at artificially depressed prices, [the consortium that won the bid for ELIC's assets] concealed the true identities of its members and effectively flipped the bond portfolio to an undisclosed member-defendant Artemis S.A. - by means of a series of secret agreements, transactions, and post-bid transfers, all of which were designed to suppress competition in the sale of and bidding for the *assets*. (FAC ¶¶ 32-47, 51-53.) . . . . As a result of such illegal bid-rigging and anticompetitive activities by the investor consortium, competition in the sale of and bidding for ELIC's *assets* was in fact restrained, monies paid on ELIC's SSA's were artificially depressed, and Plaitniff's 1998 payment was discounted. (FAC ¶¶ 49-54.)

Opp. at 4:8-20 (emphasis added).

Plaintiff's claims that his suit has nothing to do with the property or "transferred assets" of ELIC is clearly wrong.[11]

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[11]At the hearing on this motion, Plaintiff cited *Cellular Plus, Inc. v. Superior Court*, 14 Cal.App.4th 1224 (1993) for the proposition that the SSA's are not "property" or "transferred assets" of ELIC. However, *Cellular Plus* does not define "property" or "transferred assets." *Cellular Plus* involves the issues of standing to sue under the Cartwright Act and the primary jurisdiction of the Public Utilities Commission over the reasonableness of cellular

C. The Full Faith And Credit Clause, 28 U.S.C. §1738, Precludes This Court From Exercising Jurisdiction

Having established that Plaintiff's claims are encompassed by the Conservation Court's orders and its assertion of exclusive jurisdiction, the remaining issue is whether this Court is precluded from exercising jurisdiction because those orders are binding.

The moving Defendants' primary basis for asserting lack of jurisdiction is that this Court should give the Conservation Court's prior orders full faith and credit. 28 U.S.C. § 1738 provides, in relevant part, ". . . Acts, records and judicial proceedings. . . [of any State] shall have full faith and credit in every court within the United States . . ." The main case cited by the moving Defendants provides the framework for analysis:

> Section 1738 "commands a federal court to accept the [preclusion] rules chosen by the State from which the judgment is taken." (citation omitted.) "California applies collateral estoppel when: (1) the issue decided in the prior adjudication is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication."

Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner of California, 18 f.3d 790, 792-93 (9th Cir. 1993) (quoting *Hirst v. State of California*, 770 F.2d 776, 778 (9th Cir. 1985)). The moving Defendants satisfy the first two prongs: (1)

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telephone rates. As such, *Cellular Plus* has no bearing on the issue before this Court.

the issue of the exclusive jurisdiction of the Conservation Court was decided by that court in various orders and injunctions, including it Final Order[12] and (2) that issue is identical to the issue presented here. In the parties' respective motion papers, what was not clear was whether Carranza-Hernandez "was a party or in privity with a party to the prior adjudication." The following evidence and authorities, which were first proffered to the Court at or after the hearing, demonstrate that Plaintiff was in privity with the Commissioner.

1. Privity

Privity and fairness exist if a party to a prior adjudication represented the interests of the non-party. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1278 (9th Cir. 1992).

The Restatement (Second) of Judgments sets forth the rule:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person ins represent by a party who is:
>
> . . . .
>
> (c) The executor, administrator, guardian, *conservator*, or similar fiduciary manager of an interest of which the person is a beneficiary; or
>
> (d) An official or agency invested by law with authority to represent the person's interest . . . .

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[12]Although the Court of Appeals in *In re Executive Life Ins. Co.*, 32 Cal.App.4th 344 (1995) affirmed the Conservation Court's Final Order, it did not explicitly affirm the Conservation Court's exercise of exclusive jurisdiction.

> (2) A person represent by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process
>
> . . . .

Id. (privity exists between bondholders and their trustee) (emphasis added); *see Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 620 (1926) ("whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment . . . . Identity of parties is not a mere matter of form, but of substance.").

California Insurance Code § 1057 provides:

> In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.

The California court of Appeal described the Commissioner's role in the ELIC proceeding as follows:

> The Commissioner is an officer of the state . . . who, when he or she is a conservator, exercises the state's policy power to carry forward the public interest and to protect policyholders and creditors of the insolvent insurer. . .
>
> There appears from the pattern of the statues dealing with insurer insolvencies an underlying theme

> of resolution of questions for the benefit of policyholders by rehabilitation if possible. This is not merely a resolution of private rights, but also a matter of the public interest because of the character of insurance . . . In carrying out his or her responsibility, the Commissioner acts not only as a trustee but also as a servant of the state in the exercise of its policy power. . . In some instances individual policyholders must suffer some detriment if this is necessary to carry out the purpose of the statutory scheme . . . The limitation upon the Commissioner's authority is that its exercise be reasonably related to the public interest in rehabilitating the insurer and not be arbitrary or improperly discriminatory.

In re Executive Life Insurance, supra, 32 Cal.App.4th at 356, 375-376 (citations deleted).

Clearly, in ELIC's rehabilitation proceedings, the Commissioner has been acting on behalf of persons like Plaintiff. The Commissioner's claims against the defendants he has sued not only are substantially like Plaintiff's claims, but in fact were the genesis of Plaintiff's claims. If the Commissioner is successful, Plaintiff is among the potential and putative beneficiaries, *i.e.*, he will be entitled to part of the recovery. Thus, the third prong of collateral estoppel is established - -

Plaintiff and the Commissioner were in privity.[13] Accordingly, Plaintiff is subject to the Conservation Court's orders concerning the Court's exclusive jurisdiction.

2. Actual Notice

Plaintiff admits that he did not appeal any of the Commissioner's orders but through his counsel claims that he did not receive any notice concerning the ELIC rehabilitation proceeding and first learned about it in August 1998, when he received his reduced SSA payment. Moving defendants have not submitted evidence demonstrating that Carranza-Hernandez did receive direct and personal notice of the Conservation Court's orders about jurisdiction, but following the hearing on this motion, they filed evidence previously submitted to the U.S. District Court for the Southern District of California, which demonstrates that such notice was provided to "Policyholders, Annuitants, Contract Holders and Other Persons Interest in Executive Life Insurance Company" ("Interested Parties"):

1. On May 2, 1991, the Commissioner sent a letter to the Interested Parties with a copy of the Conservation Court's April 11, 1991 Conservation and Stay Order. Aurora Def. Exh. Q.
2. On January 29, 1993, the Commissioner sent a Report and Notice to Interested Parties with the

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[13]At the hearing, in arguing that he was not "in privity" with the Commissioner, Plaintiff cited *Garris v. Mitchell*, 7 Cal.App.2d 430 (1935). In *Garris*, a court overseeing an insurance company's insolvency granted a creditor leave to sue the Insurance Commissioner who had been appointed receiver of the insolvent insurance company. *Id.* At 433-434. *Garris* does not apply to the present action. Merely because in one context a policyholder could sue the Commissioner does not mean that in an entirely different context he is not in privity with the Commissioner.

Conservation Court's December 6, 1991 Order of Liquidation. Aurora Def. Exh. S.

3. On December 29, 1993, the Commissioner sent an "Election Package" Information Booklet to "Policyholders, Annuitants, and Contract Holders of the Executive Life Insurance Company" with the Conservation Court's August 13, 1993 Final Order Approving Modified Plan of Rehabilitation. Aurora Def. Exh. T.

Plaintiff is an "annuitant." The evidence is sufficient to confirm that he was in a position to appeal the Conservation Court's rulings. For the foregoing reasons, the Court finds that it lacks jurisdiction to entertain Plaintiff's claims against the moving Defendants.

IV. MOTION OF AURORA, NEW CALIFORNIA, CREDIT LYONNAIS AND THE INSURANCE COMMISSIONER TO DISMISS FOR LACK OF STANDING

Aurora and New California also assert that Plaintiff lacks standing to pursue this action because (1) the Conservation Court's injunctions deprive Plaintiff of standing and (2) Plaintiff's claims belong only to the Conservator, not to individual policyholders. Aurora Motion at 13:7-9. The Insurance Commissioner, as Intervenor in this action, also argues that Plaintiff lacks standing for the same reasons asserted by Aurora and New California. Commissioner Motion at 1:9-24. Credit Lyonnais joins the Aurora Motion solely with respect to the argument that only the Insurance Commissioner has standing to bring such an action.

In his Opposition, Plaintiff argues that (1) the Conservation Court's orders do not apply to his action and (2) the Commissioner does not have exclusive standing to assert Plaintiff's claims because Plaintiff has not filed claims on behalf

of ELIC or to recover ELIC's assets.[14] Plaintiff devotes four pages to arguing his standing to bring antitrust claims under the Cartwright Act and the Unfair Competition Law. He notes that California Insurance Code § 1861.03(a) provides that the insurance business and industry are not outside the scope or exempt from state antitrust and unfair business practice laws. Although this is true, Plaintiff misses the point of Defendants' arguments. Defendants are not arguing that Plaintiff altogether lacks antitrust standing or that they are immune from suits

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[14]Plaintiff also complains that the parties who challenge his standing are contradicting their previous actions or arguments. For example, he notes that Credit Lyonnais removed this action to federal court (from San Diego Superior Court) and then he claims (indiscriminately) that both it and the moving Defendants (Aurora and New California) "have thus made jurisdictional arguments to get Plaintiff both *into* and *out of* this Court, a classic Catch-22." Opp. At 22:14-15. Not so. First, the moving Defendants have done nothing inconsistent. They wound up in this Court as a result of Credit Lyonnais' removal of this action. Next, Credit Lyonnais also is not acting inconsistently, because it does not join in the moving Defendants' contention that only the Conservation Court has jurisdiction; it merely joins in their alternative argument that only the Insurance Commissioner can assert claims against Defendants premised upon their alleged misconduct in the insolvency proceedings. As to Intervenor Commissioner, it does appear that he initially filed his separate suit in Los Angeles Superior Court but not directly in the "Conservation Court" that is a part of that court. However, the Commissioner has filed in this Court a copy of a "Notice of Related Case" that he filed in the Superior Court seeking to have the case assigned to the Conservation Court. (This Court takes judicial notice of that court document.) Soon thereafter, Credit Lyonnais removed the action to this Court. In any event, these factors have no bearing on the Commissioner's argument that he alone has standing to seek the relief that Plaintiff seeks.

alleging violations of antitrust or unfair business practice laws. Instead, they argue that as to the particular violations alleged, the Insurance Commissioner has exclusive standing to pursue Plaintiff's claims.

California Insurance Code § 1037 provides:

> Upon taking possession of the property and business of any person in any proceeding under this article, *the commissioner* ***exclusively*** and except as otherwise expressly provided by this article, either as conservator or liquidator:
>
> . . .
>
> (f) [Lawsuits, execution of instruments.] *May, for the purpose of executing and performing any of the powers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding [ELIC] or in the commissioner's own name, prosecute and defend any and all suits and other legal proceedings . . . in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding [ELIC] . . . .* (emphasis added).

The "powers and authority" conferred exclusively upon the commissioner under Section 1037 include the collection and protection of the assets of the insolvent insurance company and the collection of all claims belonging to that company. Cal. Ins. Code § 1037 (a), (b). In its orders, the Conservation Court did not expressly repeat these provisions, but in its Conservation and Stay Order of April 11, 1991, the Conservation Court enjoined all persons from the "institution of suits to collect any of the

Property or institution of suits which purport to assert derivative rights on behalf of respondent." *Id.* At ¶3(g). In that same order, the Conservation Court confirmed that the Insurance Commissioner has powers under Insurance Code § 1037.[15] Aurora Def. Exh. A, § 11(f).

The plain language of Section 1037 and the foregoing orders lead to the conclusion that the Insurance Commissioner has exclusive standing to pursue claims "in connection with the administration, liquidation, or other disposition of the assets" of ELIC. *Garris v. Mitchell, supra*, supports this conclusion. There, a general creditor sued the Insurance Commissioner for fraud in his capacity as receiver of an insurance company. The court stated that the Insurance Commissioner "is the person to sue to collect assets of the estate, and . . . the creditors under ordinary circumstances have no right to maintain such an action." *Garris*, 7 Cal.App.2d 430. (The court went on to hold that this rule cannot be invoked when the Insurance Commissioner's own alleged fraudulent actions are at issue.)[16]

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[15]In its Final Order of August 13, 1993, the Conservation Court affirmed "all [of its] prior orders . . . including, but not limited to all injunctions and restraining orders. . . ." Aurora Def. Exh. G. The California Court of Appeals affirmed the Conservation Court's Final Order on February 15, 1995. *In re Executive Life Ins. Co.*, 32 Cal.App.4th at 344.

[16]Here, Plaintiff has not sued the Insurance Commissioner. The closest Plaintiff comes to alleging any wrongdoing by the Commissioner is in his Opposition to the Commissioner's Motion to Dismiss. There, Plaintiff argues that the Commissioner's assertions that Plaintiff lacks standing "can only derive from the Commissioner's apparent desire to minimize disclosure of his office's involvement and acquiescence in defendants' transactions relating to the ELIC estate (*in pari delicto*) and its post-rehabilitation ratification, approval, or acquiescence in the same."

Plaintiff does not refute these principles. In fact, Plaintiff affirmatively states that "he has not disputed or contravened the general rule stated by moving defendants, that the conservator is the person 'to sue to collect the assets of the estate.'" Opposition at 18:7-5 (citing to Aurora Motion at 17:19-21). Instead, Plaintiff argues that the general rule is not applicable because he has not filed a claim on behalf of ELIC or to recover ELIC's assets. Opposition at 18:4-5. As shown above, however, the crux of Plaintiff's complaint is that in the bidding for ELIC's assets Defendants committed various wrongs and frauds that defrauded ELIC. In his Prayer for Relief in the FAC, Plaintiff "prays . . . that defendants be ordered and enjoined to make ***restitution*** to plaintiff and the members of Plaintiff Class due to their unfair competition, including disgorgement of their wrongfully obtained assets, revenues, earnings, profits, compensation and benefits. . . " FAC, Prayer for Relief, ¶ 7 (emphasis added). These claims clearly involve "the administration, liquidation, or other disposition" of ELIC's assets. If Defendants defrauded and otherwise wronged ELIC, the Commissioner is the only party who can pursue redress on behalf of all the direct and indirect victims. Unless he is permitted to be the sole warrior seeking redress, the rehabilitation and litigation framework provided in the Insurance Code and implemented by the Conservation Court will be thwarted. Accordingly, only the Insurance Commissioner, and not Plaintiff, has standing to pursue this action.[17] Given this

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Opposition to Commissioner's Motion at 6:16-7:2. Such conclusory allegations in a legal memorandum (not a pleading) do not bring this action within the *Garris* exception.

[17]Defendants argue that even if Plaintiff's action did not involve a claim of ELIC but rather his own claim. Plaintiff would still lack standing. Defendants assert that "the Conservator has

conclusion, it is unnecessary for this Court to address the contention of Defendants other than Credit Lyonnais that Plaintiff lacks standing because his claims may only be asserted in the Conservation Court.

V. CONCLUSION

For the reasons set forth above, the Court dismisses Plaintiff's action against all Defendants except Credit Lyonnais for lack of jurisdiction and lack of standing and dismisses Plaintiff's action against Credit Lyonnais for lack of standing.

DATE: April 12, 2000

/S/
A. Howard Matz
United States District Judge

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exclusive standing to prosecute common claims affecting all policyholders relating to the rehabilitation proceedings, as well as claims of ELIC." Defendants cite *Arthur Andersen LLP v. Superior Court of Los Angeles*, 67 Cal.App.4th 1481 (1998) to support this proposition. While the Court in that case stated that "the Insurance Commissioner acts not in the interests of the equity owners of [an] insurance company, but rather in the interests of policyholders," *Id.* at 1495, even Defendants acknowledge that *Arthur Andersen* does not state that the Insurance Commissioner has exclusive standing.

FILED
DEC. 1, 2000
ENTERED
DEC. 4, 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SERGIO CARRANZA-HERNANDEZ, *et al.*,	CASE NO. CV 00-09593 AHM (CWx)
Plaintiffs,	ORDER GRANTING DEFENDANTS' MOTIONS
v.	TO DISMISS
ARTEMIS S.A., *et al.*,	
Defendants.	

Defendant Aurora National Life Insurance Company and New California Life Holdings, Inc., move to dismiss the claims against them under Rule 12(b)(6) for lack of standing. Defendant California State Insurance Commissioner Harry Low, who has substituted into the case in place of his predecessor, Chuck Quackenbush, separately moved for dismissal. After reviewing the briefs, the Court conducted a hearing on November 20, 2000. At the hearing, the Court stated that it was its intention to grant the motions. The Court summarized its reasons and stated that it would memorialize them in an order.

This is that order.

1. In this context, and as to the claims plaintiffs assert in this case, standing is to be determined according to state law, not federal law.

2. In deferring to this Court to rule upon whether plaintiffs have standing or whether their application to sue the Commissioner should be granted (the case having been removed here), Judge Lewin made it clear that in his view plaintiffs do not have standing and that had they timely and properly sought permission from him to sue the Commissioner he would have refused to allow them to do so. See page 41 of the transcript of the September 12, 2000 hearing, attached as Exh. "C" to the declaration of Richard D. Bernstein in support of Aurora's motion.

3. This Court agrees with Judge Lewin's observations. Fundamentally, the claims that plaintiffs are asserting in this case are basically the same as those that the Commissioner is asserting. They also are fundamentally the same as those that plaintiff Sergio Carranza-Hernandez previously asserted in an earlier action that this Court dismissed. The Court's reasons for previously concluding that Carranza-Hernandez lacked standing are incorporated by reference in this order and the Court finds those reasons to be applicable again.

4. The Court's ruling dismissing the earlier actions is currently on appeal. At the hearing it became clear that counsel for plaintiffs have been proposing inconsistent and apparently conflicting recommendations as to the most sensible and judicious manner for the Ninth Circuit to determine whether this Court's previous ruling on standing was correct. Thus, plaintiffs evidently sought to have an early and prompt ruling on whether they have standing in this case, so that if the Court found that they lacked standing they could quickly seek to consolidate such appeal with the appeal currently pending and ask the Ninth Circuit Court of Appeals to resolve both cases

together. Yet at the hearing on these motions, plaintiffs' counsel proposed other approaches, including deferring a ruling on these motions or enjoining the prosecution of this case pending decision on the issue now on appeal. Because the facts, contentions, principles and considerations are so closely related, the Court declines to defer a ruling an instead chooses to grant the motion, subject to the provisions specified below.

5. Plaintiffs' main contention on these motions is that having sued the Commissioner in this case, they fall within the contours of *Garris v. Mitchell*, 7 Cal.App.2d 430, 46 P.2d 225 (1935). *Garris* is distinguishable on several grounds, including that here the Commissioner has filed an action against the private defendants arising out of the ELIC liquidation, whereas in *Garris* the Commissioner had refused to correct allegedly improper preferences. Moreover, before filing this case plaintiff failed to seek or obtain leave of court, whereas in *Garris* leave had already been granted. In addition, plaintiffs once again seek a recovery that would be paid to them (or members of their class), but no necessarily to the Estate itself.

6. Plaintiffs' second contention is that the Estate of Executive Life Insurance Company ("ELIC") will be harmed unless plaintiffs are permitted to prosecute this case, because in *Low v. Altus* the private defendants have asserted against the Commissioner various defenses that, if successful, would deprive the Estate of recovery, thereby leaving the policyholders without a remedy for the wrongs they allegedly suffered. This contention lacks merit. In effect, plaintiffs are asking this Court to find, or at the very least assume, that the private defendants' defenses in *Low v. Altus*, are meritorious, thereby leaving plaintiffs as the only possible saviors of the victimized policyholders. That assumption the Court cannot and will not embrace. To start with, to the extent that plaintiffs are asserting claims that only the Commissioner has the right and the responsibility to assert, such as claims of or on behalf of the ELIC Estate itself, plaintiffs

also would be bound by those defenses. Moreover, in *Low v. Altus* the Commissioner is steadfastly asserting that he intends to seek recovery for the entire Estate, to the ultimate benefit of the policyholders. Commissioner Low has no conflict of interest (not having been in any way responsible for or even involved in the decisions and transactions that are the basis for the private defendants' defenses). In addition, as stated above, the Conservation Court has made it very clear that it would not have granted authorization for these plaintiffs to proceed. Under these circumstances, to grant standing to plaintiffs would make no sense.

7. The other authorities on which plaintiffs rely are inapplicable or unpersuasive for the reasons set forth in the reply briefs of the moving parties.

8. At the hearing the Court explored with counsel for the moving parties whether they would stipulate to an agreement tolling the statute of limitations, so that in the event that circumstances change, such as a ruling from the Ninth Circuit reversing this Court's previous dismissal of the Carranza-Hernandez action or some other unexpected development, these plaintiffs' claims would not be barred by the statute of limitations. Counsel for both the Commissioner and Aurora/New California agreed to enter into a tolling agreement that would not be prejudiced by the additional passage of time between this dismissal and any re-filing of these claims, so long as the tolling agreement would not deprive the moving parties of any defenses, contentions or rights they otherwise have as of the date of this ruling, including any statute of limitations defenses. As a condition of this order, the Court expects the moving parties to carry out their assurances by entering into such agreements. Whether plaintiffs' claims against any of the defendants, including parties who did not join in this motion, are or will be tolled by virtue of legal principles (see *Catholic Social Services, Inc. v. I.N.S.*, 2000 Daily Journal D.A.R. 123 79 (9th Cir.

November 21, 2000)), is a matter on which the Court express no view.[1]

9. Although it does appear that plaintiffs have been prone to engage in what might be construed as forum shopping or at least dubious maneuvering around the Conservation Court, the Court declines to impose sanctions against them under 28 U.S.C. § 1927, because defendants have not shown sufficiently that plaintiffs' counsel have violated that statute.

IT IS ORDERED.

DATE: December 1, 2000 /s/

A. Howard Matz
United States District Judge

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[1]The Court has read and considered the "Response" that plaintiffs filed by fax on November 30, 2000.

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

- - -

SERGIO CARRANZA-HERNANDEZ, PLAINTIFF,	)	
-v-	)	CASE NO. CV 00-9593-AHM
ARTEMIS S.A., ET AL., DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, NOVEMBER 20, 2000

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET

LOS ANGELES, CALIFORNIA 90012

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. . .

THE COURT: You want me to stay these actions?

MR SCHAEFER: No. I want you to just hold off in dismissing the plaintiffs from this case and allow them to go forward at least to summary judgment.

THE COURT: That would be totally unfair, inappropriate way to proceed. It would subject people who in my best opinion are not subject to the claims that you're asserting on behalf of these class representatives to be subjected to disruptive litigation. It would probably interfere with the

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commissioner's capacity effectively to pursue his claims against the corporate parties. It makes no sense and I won't do that. I'm not just going to defer a ruling and permit the case to continue.

Now I'll tell you this. If you could propose a different way to make sue that at a later time if the facts warranted and the facts could either be the outcome of the commissioner's action or the way it's litigated or the information that surfaces or some new bombshell that you managed to unearth, I want to make sure that the wrongdoers are punished and that the victims are made whole or to the extent if not whole, at least compensated for whatever injury they suffered.

The only barrier to having this suit that you're trying to wage now and I think improperly, the only barrier I can think of offhand to having it waged later on is the statute of limitations and that would probably be tolled.

. . .

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 02-493

IN THE

Supreme Court of the United States

SERGIO CARRANZA-HERNANDEZ, *et al.*,
Petitioners,

v.

ARTEMIS S.A., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AURORA NATIONAL LIFE ASSURANCE COMPANY AND NEW CALIFORNIA LIFE HOLDINGS, INC.

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October 28, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether this Court should grant certiorari over two brief unpublished rulings of a circuit court that interpreted the plain language of a state statute as denying standing on state law claims, and that did not reach any issues of federal law?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petition properly identifies the parties to this proceeding.

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Aurora National Life Assurance Company and New California Life Holdings, Inc. state that Respondent New California Life Holdings, Inc. ("New California") is the holding company of Respondent Aurora National Life Assurance Company. The stock of New California is owned by Aurora S.A. through a voting trust (67%) and SunAmerica Inc. (33%). Neither Aurora S.A. nor SunAmerica Inc. is publicly held. Aurora S.A. is a subsidiary of Artemis S.A., which is not publicly held. SunAmerica Inc. is a subsidiary of American International Group, Inc., which is publicly held.

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Sup. Ct. R. 10 8

SCHOLARLY AUTHORITY

13A Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1984) 7

STATEMENT OF THE CASE

Respondents Aurora National Life Assurance Company ("Aurora") and New California Life Holdings, Inc. ("New California") regret the need for even a somewhat lengthy opposition in such a simple case. However, the Petition contains so many factual misstatements and is so convoluted that Respondents believe an accurate statement of the facts and issues would be of benefit to this Court.

Petitioners here were policyholders of an insolvent insurance company, Executive Life Insurance Company ("ELIC"). Petitioners allege that certain Respondents committed wrongs giving rise to state-law claims in acquiring assets from the ELIC estate during its insolvency proceedings. The Commissioner of Insurance for the State of California ("Commissioner"), who continues to serve as the Conservator for the ELIC estate, is suing for these same alleged wrongs. See *Low* v. *Altus Fin. S.A.*, USDC No. 99-CV-02829 (C.D. Cal. filed Feb. 19, 1999) ("*Low*"). The express language of California Insurance Code § 1037 grants the Commissioner standing "exclusively" to bring such claims. This unambiguous state statute does not deny Petitioners appropriate relief. If the Commissioner prevails on his claims, Petitioners will receive a proportionate distribution from the ELIC estate, as will all other ELIC policyholders.

1. ELIC Insolvency and Conservation Proceedings. During the late 1980s and early 1990s, the junk bond market declined precipitously. Due to ELIC's ownership of one of the largest and most default-ridden portfolios of junk bonds of any financial institution in the world, it became massively insolvent, with the value of its liabilities exceeding the value of its assets by several billion dollars. As a result, the Commissioner assumed control of ELIC in April 1991, and placed it into conservation proceedings before the California

Superior Court ("Conservation Court"). Pet. App. 23a. That court named the Commissioner conservator of the ELIC estate.

Beginning in May 1991, the Commissioner conducted a 10 month-long auction of ELIC's junk bond portfolio and the rehabilitation of its insurance business. During that auction, the Commissioner solicited bids, and made a "data room" available such that all bidders had equal access to pertinent information. See *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344, 361 (1995) ("Care was taken to provide other potential investors with access to the same information that [the winning bidder] possessed"). From the 8 resulting bids, the Commissioner selected the bid of Altus/MAAF, a consortium of foreign insurers and investment firms. Under this bid, Altus would purchase ELIC's junk bonds, while the insurance operations would be rehabilitated by a new junk bond free insurance company called Aurora, a California corporation.[1] This bid also provided that Aurora would infuse $300 million in new capital into the insurance company, and would also provide over $300 million in enhancements to ELIC policyholders who became Aurora policyholders.

In August 1993, the Conservation Court approved the Commissioner's selection of the Altus/MAAF bid, observing that it was the "highest and best bid received." C.A. App. I 176 n.24.[2] In February 1995, the California Court of Appeal also affirmed the approval. Pet. App. 27a. A majority of ELIC policyholders also supported the Commissioner's selection of the Altus/MAAF bid, and with good reason: Through its acceptance, ELIC's policyholders received 92%

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[1] Aurora's shares would be owned by New California, a domestic holding company. The MAAF Group would own New California's shares.

[2] C.A. App. I refers to the Excerpts of Record filed in the Ninth Circuit in *Carranza I*. C.A. App. II refers to the Excerpts of Record filed in the Ninth Circuit in *Carranza II*.

or more of their policy values, whereas most experts had predicted policyholders would receive approximately 75%. C.A. App. I 165.

2. The Commissioner's Suit: Low v. Altus Finance. In February 1999, the Commissioner filed suit against, among others, Altus and the MAAF Group in California Superior Court alleging fraud, conversion and unfair competition with respect to the ELIC rehabilitation. See *Low*, USDC No. 99-CV-02829 (C.D. Cal. filed Feb. 19, 1999).[3] Specifically, the Commissioner alleges that, through a series of secret agreements, Altus – which is owned by Credit Lyonnais, an arm of the French government – was really in control of the shareholdings in New California. The Commissioner maintains that had he known of the alleged relationship and agreements between Altus and the MAAF Group, he would not have selected the Altus/MAAF bid, and seeks damages and restitution on behalf of all ELIC policyholders. Credit Lyonnais, a named defendant in *Low*, removed the Commissioner's suit to Federal District Court pursuant to the removal provisions of the Foreign Sovereign Immunities Act ("FSIA").

3. Carranza I. One month after the Commissioner filed suit in *Low*, Petitioners filed a class action ("*Carranza I*") in California Superior Court on behalf of certain ELIC policyholders in violation of the Conservation Court's prior order requiring its leave to file such a suit. Just like the Commissioner's complaint in *Low*, the *Carranza I* complaint contended that the Altus/MAAF Group's alleged deception enabled them to obtain ELIC assets at a reduced price, derivatively harming ELIC policyholders. Pet. App. 30a. The *Carranza I* plaintiffs' claims were identical in all material respects to the Commissioner's claims in *Low*. *Id.*

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[3] Aurora and New California were not named as defendants in *Low* until the Commissioner filed his Third Amended Complaint in February 2000.

Carranza I was unlike *Low*, however, in that the *Carranza I* plaintiffs sought recovery for themselves as opposed to recovery on behalf of the ELIC estate. *Id.* at 47a.

As it had in *Low*, Credit Lyonnais removed *Carranza I* to Federal District Court pursuant to the FSIA's removal provisions. The District Court dismissed *Carranza I* as to all defendants with prejudice because of lack of standing. The District Court ruled that, as Conservator, the Commissioner is expressly given exclusive standing pursuant to California Insurance Code § 1037(f) to bring all claims "'in connection with the administration, liquidation, or other disposition of the assets'" of ELIC. Pet. App. 22a, 43a-48a. The District Court held that the "plain language" of section 1037(f) applied because "the crux of Plaintiff's complaint is that in the bidding for ELIC's assets Defendants committed various wrongs and frauds that defrauded ELIC," and that *Carranza I* expressly sought restitution of ELIC's assets. *Id.* at 47a. Concluding that this statute meant that "Plaintiff lacks standing to sue any of the Defendants," it dismissed *Carranza I* with prejudice against *"all Defendants . . . for . . . lack of standing."* *Id.* at 22a, 48a[4] (emphasis added).

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[4] Alternatively and independently from its standing ruling, the District Court provided an alternate basis for dismissal in ruling that although removal by Credit Lyonnais was proper under the FSIA, if the plaintiffs had standing, the District Court would have dismissed the pendent party claims against non-sovereign defendants, such as Aurora and New California, in deference to the Conservation Court's prior reservation of exclusive jurisdiction. Pet. App. 31a-43a. Unlike the standing dismissal, which was wholly unconditional, this alternate basis for dismissal was "without prejudice to [Petitioners'] filing his action in the Conservation Court (*if* on appeal or otherwise he establishes, contrary to this Court's conclusion, that he does have standing)." *Id.* at 19a (emphasis added). This alternate basis became moot because, when Petitioners filed *Carranza II*, the Conservation Court subsequently ruled that the federal courts should resolve these cases, including the standing issues. C.A. App. II 1341. The Conservation Court nonetheless stated its opinion that "[t]he Commissioner is the only one to vindicate the rights of

4. Carranza II. Before the *Carranza I* appeal was even heard by the Ninth Circuit, Petitioners filed another action (*Carranza II*) in California Superior Court. Although the claims asserted in *Carranza II* contain cosmetic changes from those dismissed with prejudice for lack of standing by the District Court in *Carranza I*, the crux of the claims (that defendants committed various wrongs and frauds in acquiring ELIC's assets) and relief requested (restitution to certain policyholders) remained the same. Pet. App. 50a-53a. In addition, the *Carranza II* complaint added two former Insurance Commissioners and the State of California as named defendants, as well as a claim labeled under 42 U.S.C. § 1983. Aurora removed *Carranza II* to Federal District Court on the basis of the section 1983 claim.[5]

Once again, the Federal District Court made the determination that the claims asserted in *Carranza II* were "the same as those that the Commissioner is asserting [in *Low*]." Pet. App. 50a. Observing that whether Plaintiffs had standing as to their claims was a question of state law, the Federal District Court concluded the *Carranza II* plaintiffs lacked standing for the same reasons they did in *Carranza I*, *viz.*, because California law unambiguously conferred exclusive standing upon the Commissioner for precisely the types of claims the *Carranza* plaintiffs asserted. *Id.* at 50a-52a. Consequently, it dismissed *Carranza II* with prejudice for lack of standing against all defendants. In its order dismissing the *Carranza II* refiled claims, the District Court noted that it had arranged for an agreement tolling the statute of limitations in the "event that circumstances change, such as a ruling from the Ninth Circuit reversing this Court's previous dismissal of the Carranza [*I*] action or some other unexpected development." *Id.* at 52a.

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policyholders as far as the assets of Executive Life Insurance." *Id.* at 1336.

[5] *Carranza I* did not contain a section 1983 claim, or any other claim arising under federal law.

5. Ninth Circuit Proceedings. Petitioners appealed both the District Court's April 2000 order dismissing *Carranza I* against all defendants for lack of standing, and its December 2000 order dismissing *Carranza II* against all defendants for lack of standing, to the Ninth Circuit. Yet the "unexpected development" of reversal did not materialize in either appeal. Instead, the Ninth Circuit, in two brief unpublished opinions, summarily enforced the plain language of California law in affirming the District Court's unconditional dismissals for lack of standing. Pet. App. 3a (*Carranza I*) ("The district court correctly concluded that the California Insurance Commissioner has exclusive standing under California law to bring the claims asserted in Carranza's action."); see also *id.* at 7a (*Carranza II*) (the District Court correctly dismissed the action "for the same reason that it dismissed the [*Carranza I*] action: the California Insurance Commissioner has exclusive standing to bring the asserted claims."). Contrary to the Petition's contentions, the court of appeals expressed no view on either tolling or on pendent subject matter jurisdiction over non-foreign sovereign defendants under the FSIA.

REASONS FOR DENYING THE PETITION

The questions presented in the Petition are not remotely worthy of this Court's review. The Ninth Circuit's two unpublished opinions address the single issue of whether Petitioners lack standing under *state* law. Moreover, not only was the Ninth Circuit demonstrably correct, but, as is evident by Petitioners' own convoluted statement of the issues (Pet. 3-13), this is an inherently factbound question of no importance to anyone except the parties to the proceedings below. Petitioners present no conflict of federal authority that is relevant to this case; to the contrary, the Ninth Circuit reached no issues of federal law in enforcing the plain meaning of a state statute. The remaining two "questions presented" – tolling and pendent subject matter jurisdiction – are not raised by this case, and represent nothing more than

Petitioners' attempt to torture a federal issue out of the decision below. Indeed, the Ninth Circuit expressed no view on either of those questions; its conclusion regarding standing obviated the need to do so. Thus the "conflicts" Petitioner alleges (*id.* at 23-26) are simply not raised by this case. Neither the tolling issue nor the pendent jurisdiction issue relied on by Petitioners in support of their "circuit split" arguments are remotely relevant to this case, and the Ninth Circuit consequently expressed no view on them.

I. THE NINTH CIRCUIT'S TWO UNPUBLISHED DECISIONS ON STATE LAW ARE NOT REMOTELY WORTHY OF THIS COURT'S REVIEW.

A. The Ninth Circuit's Conclusions That Petitioners Lack Standing Under State Law Raise No Issue Of Federal Law.

In an attempt to torture a federal issue out of the decision below, Petitioners cite numerous authorities concerning Article III standing. Yet the Ninth Circuit affirmed the District Court's correct application of *state*, not federal, law to resolve the question of whether the *Carranza I* and *II* plaintiffs had standing. This is because the lower courts undoubtedly recognized that, as a matter of hornbook law, when a plaintiff raises state law claims in federal court, state law standing requirements apply, in addition to Article III standing requirements. This is true regardless of whether the action was commenced in a federal court or removed to it. See 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.14, at 90-91 (2d ed. 1984) ("[S]tate law of standing should be applied as to state rights [raised in federal courts], whether the state question arises in an original diversity action, *on removal from state court*, or as a matter of ancillary jurisdiction.") (emphasis added; footnote omitted)

(citing cases).[6] Clearly, the Ninth Circuit's enforcement of state standing law is not an "important question of federal law" worthy of this Court's review. Sup. Ct. R. 10.[7]

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[6] The fact that removal of *Carranza I* was based on the FSIA does not change the rule that state law governs standing on state law claims. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983), this Court observed the FSIA's language and history clearly establish that the FSIA was not intended "to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." Thus, *First National* held that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622. *See also* 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances").

[7] Petitioners have not contended (in any court or their Petition) that federal law applies to standing based on their assertion, in *Carranza II*, of a section 1983 claim. Accordingly, any such issue is waived. Even if it were not waived, Petitioners would still lack standing for at least two reasons. First, section 1983 case law is uniform that claims for derivative injuries may not be pursued. *See, e.g., Flynn* v. *Merrick*, 881 F.2d 446, 450 (7th Cir. 1989); *Smith* v. *Martin*, 542 F.2d 688, 689-90 (6th Cir. 1976); *Erlich* v. *Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *see also Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268-74 (1992) (interpreting RICO to adopt common law rule that only trustee, not creditors, may sue for injury to insolvent estate). Second, the McCarron-Ferguson Act, 15 U.S.C. § 1012(b), requires that section 1983 not be interpreted to conflict with or displace Cal. Ins. Code § 1037(f). *See, e.g., Quackenbush* v. *Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997) ("there is no question that California's insurer-insolvency provisions regulate the 'business of insurance' and are saved from preemption by the McCarran-Ferguson Act"). In all events, any standing issue concerning the section 1983 claim (if it were not waived) would be factbound and not involve any conflict.

B. The Ninth Circuit's Conclusions That Petitioners Lack Standing Under State Law Were Demonstrably Correct.

Petitioners have no basis for quarrelling with the Ninth Circuit's factbound determination that they lacked standing under state law. California law is unambiguous as to the question of who has standing to assert precisely the types of claims plaintiffs asserted in *Carranza I* and *II*. Specifically, California Insurance Code § 1037(f) provides that the Commissioner "exclusively" has standing to pursue claims "in connection with the administration, liquidation, or other disposition of the assets" of ELIC.[8] Indeed, the California Court of Appeal recently held that section 1037(f) gives the "sole and exclusive authority" to sue to the Commissioner. *Quackenbush* v. *Superior Court*, 79 Cal. App. 4th 867, 874 (2000). The plain language of this provision compels the conclusion that the Commissioner and the Commissioner alone has standing to pursue claims arising out of ELIC's rehabilitation. Certainly where, as here, the Commissioner has in fact exercised his section 1037(f) authority by bringing the *Low* action, his authority is exclusive.

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[8] Section 1037(f) provides:

> Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:
>
> . . . .
>
> . . . may, for the purpose of executing and performing any of the powers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding [ELIC] or in the commissioner's own name, prosecute and defend any and all suits and other legal proceedings . . . in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding.

Accordingly, the Commissioner, who has continued to be ELIC's Conservator, "exclusively" has standing to bring claims relating to the "disposition" of ELIC assets during the conservation "proceeding."

The Ninth Circuit ruling also enforces the public policy underlying section 1037(f). First, any other rule would open the floodgates to litigation of multiple claims by policyholders even after approval of a rehabilitation plan, thereby creating the possibility of inconsistent judgments. This would undermine the finality necessary for California's statutory scheme governing insurance insolvency proceedings to function. Second, the Commissioner's exclusive standing is necessary to ensure the equitable treatment of all policyholders. Without it, a race to the courthouse by individual policyholders – such as those in *Carranza I* and *II* – would ensue and compromise the uniform and equitable distribution of the insolvent insurer's assets. Finally, in passing section 1037(f), the California legislature answered the question of whether an insolvent insurer's estate and policyholders need multiple sets of attorneys pursuing multiple claims with a resounding "no". Any other rule would multiply the number of lawyers claiming a share of any recovery on behalf of the estate and policyholders.

Carranza I and *II* asserted precisely the type of claims section 1037(f) reserves for the Commissioner. As the lower court correctly observed, "the crux of Plaintiff's complaint is that in the bidding for ELIC's assets Defendants committed various wrongs and frauds that defrauded ELIC." Pet. App. 47a. There can be no question that these claims involve "the administration, liquidation, or other disposition" of ELIC's assets. The Ninth Circuit thus properly concluded that Petitioners lacked standing because the claims asserted in *Carranza I* and *II* were identical in all material respects to the claims reserved for, and asserted by, the Commissioner himself.

Nor did the Ninth Circuit err in affirming the District Court's rejection of the *Carranza I* and *II* plaintiffs' assertions they fit within an exception to section 1037(f). Relying on *Garris* v. *Mitchell*, 46 P.2d 225 (Cal. Ct. App. 1935), Petitioners urged below that they had standing under

California insurance law to bring a direct action for breach of trust and fraud related to ELIC's rehabilitation proceedings. As the District Court correctly observed, however, *Garris* involved (among other things) a situation where a Commissioner had refused to correct clearly improper preferences. Pet. App. 51a. This is in stark contrast to the instant case where the Commissioner has filed the *Low* action against numerous private defendants and is pursuing the very claims urged by Petitioners for the benefit of all ELIC policyholders.[9]

In sum, the Ninth Circuit did no more than affirm a correctly-applied rule of state law that clearly compelled the result that Petitioners lacked standing. This does not remotely warrant review by this Court.

II. THE REMAINING "QUESTIONS PRESENTED" THAT PETITIONER URGES AS THE SOURCE OF CONFLICTS ARE NOT RAISED BY THIS CASE.

A. There Was Nothing Conditional About The Ninth Circuit's Conclusion That The District Court Correctly Dismissed *Carranza I* And *II* For A Lack Of Standing As To All Defendants.

In its second "question presented," Petitioners argue that the decision below requires this Court's intervention to correct a split in the Circuits regarding the doctrine of tolling. Pet. 23. Petitioners thus implausibly insist that the Ninth Circuit created a conflict by establishing a new tolling doctrine of "'wait and see standing.'" *Id.* at 14 (emphasis

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[9] Moreover, *Garris* was decided before section 1037(f) became effective and consequently did not address section 1037(f). *See Garris*, 46 P. 2d at 226; 1935 Cal. Stat. ch. 145. In all events, *Garris* set forth the prior court-made rule that the Conservator (the Commissioner in this case) "is the person to sue to collect the assets of the estate, and that the creditors under ordinary circumstances have no right to maintain such an action." *Garris*, 46 P. 2d at 227.

omitted). This is a blatant distortion of the ruling below. The Ninth Circuit did not hold, implicitly or explicitly, that Petitioners' claims were conditionally dismissed or could be refiled. To the contrary, the Ninth Circuit held simply that the plaintiffs lacked standing. A review of the appellate court's two short memorandum dispositions reveal no mention of "tolling" or of anything about the dismissal being conditioned on a future occurrence.

Petitioners' argument simply stems from a misreading of the District Court's opinion. In context, it is clear that although the District Court dismissed *Carranza II* based on a lack of standing, it also believed there was an alternative, *independent* basis for dismissal – *i.e.*, plaintiffs' failure to obtain leave to sue from the Conservation Court as required by a prior order of the Conservation Court. See Pet. App. 50a, 52a. By arranging for tolling agreements, the District Court simply provided for the possibility that the Ninth Circuit might disagree with it on standing and, *if that circumstance occurred,* tolled the time for plaintiffs to cure their independent failure to obtain leave from the Conservation Court to sue. The dismissal based on standing, however, was entirely unconditional, as was the Ninth Circuit's disposition affirming that order. The appellate court was silent as to tolling for good reason: Its conclusion that Petitioners' claims were properly dismissed with prejudice for a lack of standing obviated any reason to consider any tolling issues. Thus, the Petition raises no genuine tolling issue.

B. The Decisions Below Exercised Pendent Subject Matter Jurisdiction.

In its third "question presented," Petitioners make the unbelievable assertion that the decision below directly conflicts with "Ninth Circuit and the majority [of] authority from other circuits on the issue of mandatory pendent jurisdiction under the Foreign Sovereign Immunities Act where the foreign sovereign remains a party to the action." Pet. 14. Petitioners therefore ask this Court to order the lower

courts to exercise pendent subject matter jurisdiction over the non-foreign sovereign defendants. The issues of standing and pendent subject matter jurisdiction, however, are very different. The lower courts already have exercised pendent subject matter jurisdiction. When the Ninth Circuit affirmed the District Court's orders dismissing *Carranza I* and *II* for lack of *standing as to "all Defendants,"* including domestic defendants Aurora and New California, Pet. App. 22a, 48a, 50-51a (emphasis added), it in fact approved the District Court's exercise of pendent subject-matter jurisdiction to apply its standing dismissal to the non-foreign sovereign defendants in these actions.

* * * *

This case raises no federal issue whatsoever, and the purported conflicts of authority that Petitioners drum up are nonexistent. Moreover, the Ninth Circuit's holdings that Petitioners lack standing as a matter of state law are plainly correct, and no error even conceivably warrants this Court's intervention.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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